

PRACTICAL LAW

A treatise on Business Law especially
compiled for schools that teach Ac-
counting, Business Practise, Office
Methods and kindred subjects : : : :

By BURRITT HAMILTON



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PREFACE

We publish this volume in response to a demand for an elementary law book dealing with present-day business *practically*. We employed a busy lawyer and instructed him to write *out of his experience*. The result is a radical departure from hackneyed lines—a live, new book.

Everything, except accuracy, has been sacrificed to clearness and utility. This volume is *doubly* useful. As a terse text-book, illustrated by *actual* cases, it will commend itself to both teacher and student. As an authoritative statement of legal principles, forms and precedents, it will be found of great service in the hands of the man of affairs.

The aim of this book is not toward technical legal instruction. *It tells how to do things*. Its purpose is to aid men and women to transact business *safely*. Moreover, by citing scores of actual cases, it shows how the highest courts all over this land *apply the law to facts*.

The many recent changes in the law of Negotiable Instruments alone, would have warranted this timely publication. But the merit of the book—its scope, its clearness, its originality of treatment—are the stronger reasons for which we commend it to our patrons.

THE PUBLISHERS.

TABLE OF CONTENTS

DEFINITIONS OF LEGAL TERMS.....	Page x
EXPLANATIONS	Page xv
INTRODUCTION	Page i

Practical law.—Purposes of law.—Study of law.—Natural Justice.—Statute law.—Constitutionality.

THE WANT OF DUE CARE.....CHAPTER I

Importance of the subject.—Special cautions.—Negligence.—Penalty of negligence.—Care in one's own acts.—Contributory negligence.—Proximate and remote causes.—Negligence in executing written instruments.

PROPERTY CHAPTER II

Kinds of Property.—Right to use property.—Right to defend property.—Trover and replevin.—Title to property lost and found.—How one may be deprived of property.—Destruction of property.—Capture by enemy.—Seizure under process.—Prescription.—Adverse possession.

CONTRACTS CHAPTER III

Importance of subject.—Meaning of "Enforcible."—Classes of contracts.—Forms of contracts.—A simple contract.—Testing a contract.

AGREEMENT CHAPTER IV

When agreement occurs.—Difference between agreement and contract.—How agreement is attained.—Offer.—Acceptance.—Revocation.—Cancellation of orders.—Offer, acceptance and revocation by mail and telegraph.

MAKING AND EXPRESSING THE AGREEMENT, CHAPTER V

Two dangers.—Improper time.—Contracts improperly expressed.—Contracts which cannot be performed within one year.—Contracts to pay the debt of another.—Contracts made in consideration of marriage.—Contracts for the sale of any interest in land.—Standing timber.—Contracts for the sale of personal property.—Contracts for services.—Payment and delivery.—Putting the contract into writing.—Contents of memorandum.—Signing the memorandum.—Signing by agent.

COMPETENCY OF PARTIES CHAPTER VI

Incompetent parties.—Infants.—Necessaries.—Disaffirmance.—Return of property.—Fraud of infant.—Lunatics and drunken persons.—Bad faith.—Necessaries.—Lunatics under guardianship.—Duress.—Contracts of married women.—Necessaries.

CONSIDERATION CHAPTER VII

The meaning of consideration.—Absence of consideration.—Good considerations.—Money and things of value.—Mutual promises.—Acts and forbearances.—Natural love and affection.—Valuable consideration.

CERTAINTY AND LEGALITY OF OBJECT.....CHAPTER VIII

Certainty.—Illegal contracts.—Contracts in violation of law.—Contracts contrary to public policy.—Illegal contracts.—Contracts in restraint of trade.—Contracts stifling competition.—Contracts to influence public officials.—Gambling contracts.—Marriage brokerage.—Usurious contracts.—Contracts for immoral purposes.

CONSTRUCTION OF CONTRACTS.....CHAPTER IX

Words.—Clerical errors.—Double construction.—Satisfaction.—Negative contracts.—Reasonable time.—Contracts partly written and partly printed.—Writing not varied by parole.—The law of place.

TERMINATION OF CONTRACTS.....CHAPTER X

How contracts are terminated.—Performance.—Impossibility of performance.—Substitution.—Cancellation.—Rescission.—Fraud.—False representations.—Opinion.—Expert opinion.—Mistake.—Mutual mistake.—Breach of contract.—Breach of implied contract.—Inducing persons to break a contract.—Limitation.

DEFENSES AGAINST CONTRACTS.....CHAPTER XI

Defenses.—Merger.—Alteration.—Forgery.—Discharge in bankruptcy.—Statute of limitations.

PRINCIPAL AND AGENT CHAPTER XII

The relation.—Kinds of agents.—General agents.—Special agents.—Conferment of authority.—Ratification.—Authority to collect.—Duty of agent.—Liability of agent.—Signature of agent.—Termination of agency.—Termination by limitation.—Termination by revocation.—Termination by insanity.—Termination by bankruptcy.—Termination by death.—Disregard of instructions.

PARTNERSHIP CHAPTER XIII

The relation.—Classes of partners.—Creation of partnership.—Kinds of partnership.—Trading partnerships.—Firm bound,

though funds misappropriated.—Non-trading partnerships.—
 Good faith.—Suits by partners.—Sharing profits and losses.—
 Compensation.—Dissolution.—Notice of dissolution.

THE EMPLOYMENT OF LABOR.....CHAPTER XIV

The relation.—Duty of master.—Safe premises.—Safe appli-
 cances.—Warning of extraordinary danger.—Care in selecting
 servants.—Assumed risks.—Negligence of fellow servants.—
 Contributory negligence.—Payment of servant.—Duty of
 servant.—Discharge.—Wrongful discharge.

CARRIERS CHAPTER XV

Classes of carriers.—Liability of private carriers.—Liability of
 common carriers.—Act of God.—Loss or destruction of
 goods.—Loss from natural causes.—Limitation of liability.—
 Loss on connecting line.—Liability for its own negligence.—
 Stipulation as to value.—Rules.—The bill of lading.—Draft
 with bill of lading.—Discrimination in rate.—Stoppage in
 transitu.

SALES OF PERSONAL PROPERTY.....CHAPTER XVI

Sale.—Title.—Bill of sale.—Requisites of sale.—Change of
 ownership.—Sales for cash.—Sales on credit.—Condition unper-
 formed by vendor.—Delivery to vendee.—Consigned goods.—
 Express reservation of title by vendor.—Inspection of goods.—
 Latent defects.—Quality of goods.—Purchase by particular
 description.—Warranty of fitness.—Warranty of food.—War-
 ranty in sales by sample.—Fraud in sales

SALES OF REAL ESTATE.....CHAPTER XVII

Sales of real estate.—Land options.—Form of option.—Land
 contracts.—Form of land contract.—Parties to land contract.—
 Recording.—Forfeiture.—Deeds.—A certain quantity, "more
 or less."—Examination of title.—Warranty Deeds.—Quit claim
 deeds.—Consideration.—Execution and delivery.—Delivery.—
 Return of unrecorded deed.—Estates by entireties.—Execution
 of deeds in blank.—Recording.

LANDLORD AND TENANT.....CHAPTER XVIII

Lease.—Duties of landlord.—Renewal.—Repairs.—Rent.—
 Notice to quit.—Reentry of landlord.—Destruction by fire.—
 Assignment of lease.

BANKING CHAPTER XIX

Banks.—General deposits.—Presentation of check.—Stoppage
 of payment.—Check not an assignment.—Certified checks.—
 Forged checks.—Returned checks.—Special deposits.—Set off.—
 Instruments payable at bank treated as checks.—Overdrafts.—
 President.—Vice-president.—Cashier.—Powers of directors.—
 Liabilities of directors.—Collections.

COMMERCIAL PAPER CHAPTER XX

Classes of paper.—Negotiable instruments.—Advantages of negotiability.—Holder in due course.—Transferee of holder in due course.—Persons not holders in due course.—Reason for protecting holders in due course.—The negotiable instruments law.—Bills of exchange.—Promissory notes.

THE LEGAL HISTORY OF A BILL OF EXCHANGE

..... CHAPTER XXI

Issue of bill.—Parties to the bill.—Presentation and acceptance.—Maturity.—Dishonor by non-payment.—Protest.—Notice of Dishonor.—Discharge for want of notice.—Settlements after dishonor.

THE LEGAL HISTORY OF A PROMISSORY NOTE

..... CHAPTER XXII

Issue of note.—Indorsement in blank.—Indorsement in full.—Waiver of rights by indorser.—Indorsement without recourse.—Guaranty of payment.—Restrictive indorsement.—Dishonor and notice of dishonor.—Collection.—The Surety.

NEGOTIABLE INSTRUMENTS CHAPTER XXIII

When is an instrument negotiable.—Signing.—Payable in money.—Variance between words and figures.—Time of payment.—Words of negotiability.—Certainty as to amount.—Additional provisions.—Antedating and postdating.—Filling up blanks.—Negotiation.—Parties.—Liabilities of drawer.—Liability of drawee.—Liability of maker and acceptor.—Liability of payee.—Liability of holders who transfer by delivery.—Liability of general indorsers.—Forms of indorsement.—Liability of one who indorses "without recourse."—Dishonor.—When presentment for acceptance must be made.—When presentment for acceptance is excused.—How presentment for acceptance is made.—Acceptance.—Time for acceptance.—Kinds of acceptance.—General acceptance.—Qualified acceptance.—Acceptance for honor.—Necessity of presentment for payment.—Waiver.—Implied waiver.—Presentment for payment.—Instrument must be shown.—Protest.—Contents of certificate of protest.—Summary of omissions which discharge drawers and indorsers.—Sureties.—Guarantors.—Material alteration.—Forgery of signature.—Usury.—Bonuses.—Payment of interest in advance.

LOANS, CREDITS AND COLLECTIONS.....CHAPTER XXIV

Loans.—Security.—Suretyship.—Indorsement.—Indemnity bonds.—Guaranties.—Mortgages.—Real estate mortgages.—Form of real estate mortgage.—Chattel mortgages.—The insecurity clause.—Permission to sell.—The mortgage note.—Description of mortgaged property.—Foreclosures.—Sale.—

Deficit and surplus.—Rights of purchaser.—Redemption.—Subrogation.—Dual mortgages.—Deeds operating as mortgages.—Deed with contract to reconvey.—Bill of sale given as security.—Assignment of mortgage.—Pledges.—Pledges of corporate stock.—Foreclosure of pledge.—Liens.—Vendors' liens.—Workmen's liens.—Liens of carriers and others.—Liens by attachment.—Garnishment.—Judgment liens.—Exemptions.—Tender.—Legal tender.—Objections to tender.—Exact amount must be tendered.—Tender must be kept open for acceptance.—Tender admits debt.—Payment.—Payment to wrong person.—Accepting notes, checks and orders in payment.—Voluntary payment.—Compromise.—Accord and Satisfaction.—Application of payments.—Collection of debts.—Procedure in collecting.—Collection of "outlawed" claims.—When does the statute become operative.—Suspension of statute.—Limitation withdraws remedy.—Renewal.—Unauthorized application no renewal.—Written acknowledgment.—Assignments for benefit of creditors.—Bankruptcy.—Who may become bankrupts.—Acts of bankruptcy.—Insolvency.—Discharge.—Debts first paid.—Uses of bankruptcy.

CORPORATIONS CHAPTER XXV

Characteristics.—Corporations compared with partnerships.—Charter.—Name.—Capital stock and shares.—Payment for stock.—Location.—Powers and purposes.—Subscriptions and payment thereof.—Duration.—Incorporators.—Recording articles of association.—By-laws.—Preliminary investigation.—Kinds of stock.—Voting powers.—Cumulative voting.—Proxies.—Transfers of stock.—Powers and duties of officers.—Directors.—President.—Vice-president.—Secretary.—Treasurer.—Salaries of officers.—Annual reports.—Receivers.—Dissolution.

STATUTE OF FRAUDS	Table A.
CONTRACTUAL POWERS OF MARRIED WOMEN....	Table B.
INTEREST AND USURY.....	Table C.
STATUTES OF LIMITATIONS.....	Table D.

DEFINITIONS OF LEGAL TERMS

These definitions apply to words and expressions used in this book and not elsewhere herein defined. Their mastery at the outset will materially assist the student in understanding the statements and illustrations which follow.

Abatement, a reduction.

Acceptance, an accepted bill; also, the act of accepting a bill.

Acceptor, one who accepts a bill.

Accord and Satisfaction, a settlement by compromise.

Acknowledgment, admission of the execution of a writing, made before a proper officer.

Action, a suit brought in a court of justice.

Adjustment, settlement of a claim.

Adjudication, the giving of judgment.

Administrator, one who settles an estate.

Administration, the act of settling an estate.

Adverse Possession, visible, open, notorious and hostile occupancy of real estate claimed by another.

Affirm, to ratify.

Alimony, an allowance made to a wife out of her husband's estate for her support during or after divorce proceedings.

Appurtenance, an adjunct, an appendage; a thing which goes with something else, as a fence goes with a farm.

Assignment, a transfer of ownership in property.

Assignee, one to whom an assignment is made.

Assignor, one who makes an assignment.

Bill, a bill of exchange.

Blank, an incomplete legal instrument. When a signature is affixed to an incomplete legal instrument, the document is said to be "signed in blank."

Bona fide, in or with good faith.

Chattel, an article of personal property.

Check, an order drawn upon a bank for the payment of money.

Claim, a bill or account receivable, a demand.

Collateral Security, security in addition to the personal obligation of the party bound.

Collusion, a secret agreement between two parties designed to violate some third party's rights.

Competency, proper ability.

Consideration, the thing given or forborne to induce an act or forbearance on the part of another.

Construction, the act of determining the meaning of language used.

Contractual, relating to contract.

Conveyance, the transfer of title to land.

Counsel, one who gives advice in matters of law.

Covenant, a lawful promise.

Curtesy, a husband's conditional life estate in the lands of his wife. (This estate is generally abolished.)

Damages, pecuniary compensation awarded for a loss or injury. This word is to be distinguished from the word "damage" which refers to the loss or injury itself.

Decree, the judgment of a court.

Deed, the written instrument by which property is conveyed.

Defalcation, a breach of trust by misappropriation of funds.

Default, omission to perform a promise or obligation.

Defendant, the person against whom suit is brought.

Determinable, capable of being ascertained or determined.

De facto, in fact; actually but not legally.

De jure, in law; legally as well as actually.

Diligence, attentiveness.

Disaffirm, to repudiate.

Dishonor, refusal to accept a bill, or refusal or neglect to pay a bill or note at maturity.

Domicile, a person's fixed place of abode.

Embezzlement, the fraudulent appropriation of property by one to whom it has been entrusted.

Equity, justice, natural right judicially administered.

Escrow, a deed held by a third person for delivery to the grantee on performance of some condition.

Estate, one's property.

Et al., an abbreviation for *et alii*, meaning "and others."

Execution, completion, as the signing, sealing and delivery of a deed. The word is also the name of a writ commanding a sheriff, or other officer, to seize and sell property to satisfy the judgment of a court.

Executor, a person appointed to perform the provisions of a will.

Fee simple, an absolute, inheritable title in land.

Filing, depositing a paper with a proper officer to be kept for public reference.

Firm, a copartnership.

Forfeiture, a penalty for an act or omission.

Grant, a transfer by deed.

Grantor, one who makes a grant.

Grantee, one to whom a grant is made.

Guaranty, a promise to answer for the debt or default of another.

Guarantee, one to whom a guaranty is made.

Guarantor, one who makes a guaranty.

Heir, one who inherits by right of relationship.

Holder in Due Course, one who gives value for negotiable paper, in good faith, before maturity and without actual or constructive notice of defects.

Implied, necessarily deduced from surrounding circumstances.

Indemnity, a contract to protect another against loss.

Instrument, a written document.

In toto, wholly, completely.

Joint, united, combined.

Judgment, the official decision of a suit.

Judicial, of or proceeding from a court of justice.

Jurisdiction, the right to hear and decide matters in litigation.

Lease, a contract for the possession of real estate in consideration of rent.

Lessee, one to whom a lease is made.

Lessor, one who makes a lease.

Levy, a judicial seizure.

Liability, legal responsibility.

Libel, written defamation.

Lien, a claim upon the property of another for some debt or charge.

Limitation, a restriction.

Liquidated, ascertained, fixed, certain. A liquidated claim is one the amount of which is certain.

Liquidation, the act of "winding up" or closing the affairs of a concern; making settlement.

Litigation, a contest in court.

Majority, more than half; also, full legal age.

Maturity, the date upon which an obligation falls due.

Misappropriation, a fraudulent misapplication of funds.

Nominal, in name only.

Obligation, a legal duty.

Obligee, one to whom an obligation runs.

Obligor, the person under obligation.

Offeree, one to whom an offer is made.

Offerer, one who makes an offer.

Par Value, a value equaling an instrument's face value. Thus the par value of a stock certificate is a value equaling the certificate's face value.

Paramount, superior.

Parol, verbal.

Payee, one to whom payment is to be made.

Payor, one who is obligated to make payment.

Plaintiff, a party who brings suit.

Prescription, title acquired through long enjoyment or use.

Process, the writs by which suits are commenced. (See writ.)

Proximate, immediate, nearest.

Ratification, the adoption of an act.

Recording, spreading a copy of an original instrument upon the records kept in a public office.

Remedy, the means by which the violation of a right is prevented, redressed or compensated.

Revocation, withdrawal.

Said, before mentioned.

Set-off, a counter-claim.

Spouse, a man or woman joined in wedlock.

Suit, a law suit.

Surety, a joint obligor who, in case he makes payment, is entitled to indemnity from some other person who ought himself to have made the payment.

Tender, an offer of the thing which the offerer is obligated to deliver. When money is due, the tender must be of money.

Title, the means whereby a person's right to property is established.

Third parties, persons collaterally interested: persons other than the original parties to a contract or other instrument.

Transferor, one who makes a transfer.

Transferee, one to whom a transfer is made.

Ultra vires, beyond power.

Writ, the formal written command of a court requiring an act or forbearance.

EXPLANATIONS

The illustrations used to show the practical application of the principles of law stated in this book are taken from *actual* cases decided by appellate courts. Abbreviations **are** necessarily used. Thus, "Dartmouth College v. Woodward, 4 Wheaton (U. S.), 518," means "The case of Dartmouth College against Woodward, beginning at page 518 of the 4th volume of Wheaton's United States Supreme Court Reports."

So "Powers v. Harlow, 53 Mich. 507," means "The case of Powers against Harlow, decided by the Supreme Court of Michigan and reported, beginning at page 507 of volume 53 of the Supreme Court Reports of Michigan."

In like manner 88 Ga. 40 refers to a decision by the Supreme Court of Georgia, beginning at page 40 of volume 88 of the reports of that court.

The highest state court in New York is the Court of Appeals, so Laidlaw v. Sage, 158 N. Y. 73 refers to a decision rendered by the New York Court of Appeals.

If the student has, or can obtain, access to a complete law library, he may read for himself, in all its interesting details, the full story of each case cited.

PRACTICAL LAW.

INTRODUCTION.

1. Practical Law.—By Practical Law we mean the rules of conduct governing ordinary business affairs. Knowledge of these rules is necessary to safe dealing. It is the legal duty of every person to know the law. Ignorance of law cannot be used as an excuse. Were this not so, the vicious might gain protection by remaining uninformed.

2. The Purposes of Law.—In the business world, law establishes order by providing *uniform* rules of commercial conduct. Law protects property by defining the rights of the owner. Law protects rights by forbidding, punishing and redressing wrongs.

3. The Study of Law.—No one can become accomplished in the transaction of business without first having mastered the principles by which business is governed. To-day, business men are generally educated. The uninformed are at a disadvantage. They are prone to overlook necessary precautions. Through want of proper care they frequently find themselves the victims of errors, deceptions, legal entanglements and loss. Under modern conditions, knowledge of practical law is as useful as knowledge of arithmetic. Nor is it more difficult of attainment. Law is mainly common sense. Every law rests upon some reason. When we have grasped the reason *we know the law*.

4. Natural Justice.—The law attempts to enforce what is right between man and man, ever keeping in mind the public welfare. When the interests of individuals conflict with public rights, the rights of the public will prevail. The rights of the many are superior to the interests of the few.

The common law consists of the principles of natural justice. It exists without legislative act, and derives its name from the fact that it is common to the whole country. When courts are called upon to decide a matter to which no statute applies, they base their decision upon the common law. In this they are aided, and to some extent guided, by prior decisions called "precedents," rendered in cases involving the same or similar facts.

5. Statute Law.—When laws are reduced to written form by legislative enactment, they are called "statutes." The value of statutes consists in their certainty. Courts and people may differ in their views of what constitutes natural justice, but there is less likelihood of doubt about the meaning of a printed page.

Occasionally several states pass identical laws on some subject of general interest. Thus, many of these states have adopted a uniform code known as "The Negotiable Instruments Law." Into this code have been gathered the rules that have grown up through centuries of practical experience and adjudication.

The tendency of the states is toward greater harmony in legislation. At present the laws are in confusion. Of necessity this is a book of general principles. It is intended for use in all states. The statutes and court decisions of the several states differ. The student should refer to the laws of his own state for that precise local information which the scope of this book forbids.

6. Constitutionality.—In the language of Abraham Lincoln, this is a "government of the people, by the people and for the people." This government *derives all of its powers from the consent of the governed*. This consent is given, primarily, through the constitution of the United States, which is "the supreme law of the land." So the constitution of each state is the supreme law of that state. It follows that any transgression of the governing constitution, whether state or national, is a violation of the will of the people, and must therefore fail. Laws in conflict with their governing constitution

are void. They are termed "unconstitutional." They are of no force for any purpose whatsoever.

ILLUSTRATION.—The constitution of the United States provides that, "No state shall . . . pass any . . . law impairing the obligation of a contract." The charter of a corporation *is a contract* between the corporation and the state. In 1816 the legislature of New Hampshire enacted a statute in which it attempted to impair the charter of the Dartmouth College corporation. The supreme court of the United States decided that the impairing statute was *unconstitutional*, and therefore void.

This case was argued by Daniel Webster and decided in an opinion prepared by Chief Justice Marshall. It is known as "the Dartmouth College case" and is one of the most famous cases in American jurisprudence.

Dartmouth College v. Woodward, 4 Wheaton (U. S.), 519.

CHAPTER I.

THE WANT OF DUE CARE.

7. Importance of the Subject.—We place this subject first because of its *supreme importance*. Nearly all misunderstandings, disagreements and lawsuits arise through someone's want of due care. A signature is affixed to an unread instrument; a bill is paid without requiring a receipt; a check is recklessly drawn; an investment is improvidently made; a loan is granted upon insufficient security; a fire is so set out that it reaches and destroys a neighbor's property; an employee is needlessly sent into a place of exceptional danger—and damage results. What was at the root of the trouble? *The want of due care.*

We often see, posted at railroad crossings, the words, "Stop! Look! Listen!" Whoever crosses without first obeying the spirit of this warning is guilty of legal negligence. There are no warnings posted at the dangerous crossings on the highway of business life, yet the words of the railroad signboard hold true. It is negligence to fail to stop and look and listen at danger points. Precipitate haste has *ruined hundreds* where it has profited one. If in doubt, *seek competent counsel*. If still in doubt, sacrifice time and profit *to safety*. We would have you alert in the avoidance of danger; not timid, but intelligently cautious; not prudish, but prudent. The accumulation of wealth depends upon the preservation of profits. The retention of wealth depends upon the avoidance of losses.

"We pay that man \$25,000 a year," said the president of a large corporation.

"Indeed!" was the reply. "Then he must bring you many profitable transactions."

"On the contrary," answered the president, "we retain him for the sole purpose of keeping us *out of unprofitable transactions.*"

8. Some Special Cautions.

(a) So keep and deal with your property that it cannot injure others.

(b) In buying property of any kind, be sure of the seller's title.

(c) In ordering goods, be explicit as to kind, quantity, quality, price, and time and manner of delivery.

(d) In receiving goods, examine them promptly and report all discrepancies without delay.

(e) In dealing with the agent of another, assure yourself of his authority.

(f) Sign no document without first knowing its contents and understanding the extent of the liability that, by signing, you will assume.

(g) Execute no unconsidered contract.

(h) Assume no indefinite obligation.

(i) Before investing, *investigate*.

(k) Exercise the utmost caution in selecting business associates. In the words of Jefferson: "*Avoid entangling alliances.*"

These rules are merely broad and practical applications of the principles of due care.

9. What is Due Care.—Due care is such caution as a prudent person would use under like circumstances. It is "care according to need." It is *care in proportion to danger*. The greater the known danger, the greater the degree of care required.

ILLUSTRATION.—Harlow negligently caused dynamite cartridges to be stored in an open box in a shed frequented by children. A little boy found the cartridges, cracked one on a stone and was maimed for life. The court held that the storing of the dangerous explosive in the place and manner stated, constituted want of due care, and made Harlow answerable for the consequences.

Powers v. Harlow, 53 Mich., 507.

10. Negligence.—The want of due care is called “negligence.” It may consist in an act or in an omission. It is neither more nor less than a failure to perform a legal duty. Any failure to act as a prudent person might be reasonably expected to act under like circumstances is negligence.

ILLUSTRATION.—It is the duty of telegraph companies to correctly transmit and promptly deliver messages. The following message was sent prepaid:

GREENVILLE, S. C., Feb. 26, 1889.

“To J. T. YOUNG, Newberne, N. C.

“Come in haste; your wife is at the point of death.

(Signed) J. W. RICE.”

The message was received at the Newberne telegraph office February 27. Mr. Young was well known, and, during business hours, was constantly in his own office, which was but a short distance from the office of the telegraph company. Nevertheless, on March 5 the message, through the negligence of the telegraph company, remained undelivered. On that day Mr. Young received a letter announcing his wife's death and burial. He went to the telegraph office and found the undelivered message. In a suit brought by him against the telegraph company, he was permitted to recover his nominal damages and compensation for the mental anguish which he had suffered.

Young v. Western Union Telegraph Co., 107 N. C., 370.

11. The Penalty of Negligence.—If my negligence damages another, who is himself without fault, I must answer for it; I must compensate him for his loss or injury.

ILLUSTRATIONS.—(I) Parties being offered a cargo of corn at 90 cents per bushel, delivered to a telegraph company, for transmission to the offerer, the following message:

“Ship cargo named at 90.”

The message was properly addressed, but the telegraph company failed to deliver it. The price of corn advanced. Through the non-delivery of the message, the senders were obliged to buy at a higher price. On account of its negligence, the telegraph company was held liable for the loss.

True v. International Telegraph Co., 60 Maine, 9.

(II) Smith maintained an open hatchway in his store. There being no railing or other guard, Engle, without fault on his part, walked into the opening, fell and was injured. Smith was required to pay Engle \$1,000 as recompense for the injury.

Engle v. Smith, 82 Mich., 1.

(III) Grant owned vicious dogs which were permitted to run without restraint about Grant's premises. Conway entered Grant's yard on lawful business, was attacked by the dogs and sustained injuries. Grant was held answerable for the damages.

Conway v. Grant, 88 Ga., 40.

12. Care in One's Own Acts.—The law holds that everyone intends the natural and direct results of his own acts. The person who sets a cause of injury into motion must answer for the consequences. Thus, if a person start a stone to rolling down a steep hill, and the stone so started dislodges others, which, in their course downward, inflict an injury, the starter of the first stone must answer for the damages.

ILLUSTRATION.—A man threw a ball of burning, oily rags into a crowd. Several persons, to save themselves, buffeted the missile, and thus sent it onward in a changed course. It finally struck a person in the eye and injured him. The thrower of the ball was held responsible.

Scott v. Shepard, 2 W. Black, 392.

13. Contributory Negligence.—The law is intended to aid those only who are using due care. If A is negligent and B is injured thereby, B must show that he was himself without fault. When a person's own want of care contributes to his injury, he cannot hold another responsible for any portion of the injury, for to permit him to do so would be to permit him to profit by his own neglect.

ILLUSTRATION.—A brakeman, whose duty it was to attend to the brakes on the two or three cars next following the engine, chose to ride on the pilot of the engine. While he was so riding, the pilot was wrecked by coming into collision with a rail at a point where another railroad crossed the defendant's line. The brakeman was seriously injured and brought suit against the railroad by which he was employed. Held, that he was not entitled to compensation for his injuries, as they were brought about by his own negligence in needlessly riding in the most dangerous place on the train.

Warden v. Louisville & Nashville R. Co., 94 Ala., 277.

14. Proximate and Remote Cause.—To make a person liable for damages, it must be shown that he is responsible for the thing which caused the injury complained of. If there are several possible causes, the law will say that the injury arose from the proximate, or nearest, cause.

ILLUSTRATION.—The following case is particularly noteworthy, not only as an illustration of the principle of “proximate cause,” but on account of the fact that Joseph H. Choate and other leaders of the bar were engaged in the several trials of the cause, in which the well known New York banker, Russell Sage was defendant.

Norcross, carrying a quantity of dynamite concealed in a carpet bag, was ushered into Sage’s office by Laidlaw, an employee. Norcross handed Sage a letter which read:

“The bag I hold in my hand contains ten pounds of dynamite. If I drop this bag on the floor, the dynamite will explode and destroy this building and kill every human being in it. I demand \$1,200,000 or I will drop the bag. Will you give it? Yes or no?”

On non-compliance with the demand, Norcross promptly dropped the bag. A terrific explosion occurred. Norcross was blown to pieces. The office was wrecked and nearly everyone about the office was either killed or seriously injured. Some time afterward, Laidlaw sued Sage, claiming that, at the moment of the explosion, Sage forcibly interposed him, Laidlaw, as a shield, or, in other words, that Sage drew Laidlaw between himself and Norcross at the moment Norcross dropped the dynamite. Laidlaw was seriously hurt. Sage escaped with slight injuries. In passing upon the case, the New York Court of Appeals held that the *proximate cause* of Laidlaw’s injuries was the explosion of dynamite, and not the act of the defendant in using Laidlaw as a shield. There was nothing in the evidence to show that Laidlaw’s danger was increased by the defendant’s act. Sage was held blameless.

Laidlaw v. Sage, 158 N. Y., 53.

15. Negligence in Executing Written Instruments.—

When a negotiable instrument, such as a check or draft, is executed by filling up blanks left for that purpose in a printed form, it is negligence to leave blanks unfilled. Heavy lines should be drawn through all spaces not filled by printed or written words or figures. If the person making the instrument neglects to do this, and some later holder changes the instrument by writing in larger amounts or different terms without defacing the paper, the negligent maker will be bound by the changed terms to one who, without knowledge of the alteration, afterwards acquires the instrument in due course.

ILLUSTRATION.—A note in the following form was issued, with unfilled blanks, as indicated:

Owosso, Sept. 27, 1890.

On or before one year after date I promise to pay to the order of William Weidman one hundred dollars at _____.

Value received with interest at _____ per cent per annum.

(Signed) JOHN McBRIDE,
GEO. B. SYMES.

Without knowledge on the part of Symes or Weidman, the words and figures "ten (10)" were inserted in the blank preceding the words "per cent." On account of his negligence in failing to fill up the blank, whereby the alteration was made easy, Symes was held liable upon the note as changed.

Weidman v. Symes, 120 Mich., 657.

CHAPTER II.

PROPERTY.

16. Kinds of Property.—Property includes all things capable of individual ownership. It is divided into two great classes, real property and personal property.

Real Property, or real estate, as it is usually called, consists of land and things attached to land.

Personal Property includes all property other than real estate.

ILLUSTRATIONS.—Farms, lots, permanent buildings, standing forests, inland lakes, unmined minerals, unharvested crops and things attached to real property with the intent to make them permanent improvements are real estate.

Live stock, harvested crops, felled timber, tools, goods, wares, merchandise, household furniture, stock in companies, securities and money are personal property.

17. The Right to use Property.—Everyone may use his own property exactly as he pleases, provided that, in so doing, he violates no law and injures no one else. Each person's rights end where another person's rights begin. To this point each may go, but whoever passes beyond and tramples another's rights thereby becomes a wrongdoer.

18. The Right to Defend Property.—The right to retain and use property carries with it the right to use force in defending such property against those who would wrongfully take it away or destroy it. This right should be exercised with the utmost care. It must not be exercised against an officer of the law who is acting in his official capacity.

When the use of force in the defense of property is allowable, *no more force may be used than the circumstances require.*

Property must not be defended by the use of dangerous weapons, or by slaying the wrongdoer, except in those cases in which the wrongdoer is perpetrating, or is attempting to perpetrate, a forcible felony. Thus in defense of property one may shoot a burglar or a robber, for their crimes are forcible felonies; but one is not permitted to shoot a mere pickpocket, because his is a crime committed, not by force, but by stealth.

If, in defending property, one uses more force than the circumstances require, he will be guilty of an assault. If one kills another in defending property when no forcible felony is being perpetrated or attempted, he will be held guilty of manslaughter.

When one has been wrongfully deprived of possession of his property, he may retake it wherever he can find it, provided he is able so to do without committing a breach of the peace.

19. Trover and Replevin.—When one is entitled to possession of personal property which is wrongfully withheld from him, he may recover its value in an action called “trover,” or he may recover possession of the specific property itself in an action called “replevin.” He has his choice.

20. Title to Property Lost and Found.—When lost property has been found, it still belongs to its true owner, and not to the finder. But the *finder* of personal property can hold it as against everyone except the true owner. If the true owner cannot be found, the property is said to belong to the finder. Personal property found concealed in other personal property belongs to the finder, and not to the owner of the personal property in which the found property was concealed. But property found concealed in the earth belongs to the owner of the real estate.

ILLUSTRATIONS.—A rag sorter found a sum of money concealed in the rags which she had been employed to sort. The court held that the money became the property of the finder and not of the owner of the rags.

Bowen v. Sullivan, 62 Ind., 281.

A lessee, in excavating, discovered an ancient boat that had been buried in the earth for centuries. The boat was held to be the property of the owner of the land.

Elwes v. Briggs Gas Co. L. R., 33 Ch. Div., 562.

See also Ferguson v. Ray, 44 Oregon, 557.

21. How One may be Deprived of Property.—One may be deprived of his property (a) by its destruction, (b) by its capture by a public enemy, (c) by judicial process, (d) by prescription, (e) by adverse possession.

22. (a) Destruction of Property.—We all know that property may be destroyed by natural causes, or by accident, or by the owner's own act, but there are instances when it may be destroyed by the state. A state may, in the exercise of its supervisory authority, called "police power," enter upon the premises of a private person and destroy, without compensation, such property as has an unlawful existence, or is noxious to the public health, public morals or public safety. Thus, a state may cause the killing of tuberculous cows without making payment to the owner therefor.

Houston v. State, 98 Wis., 481.

23. (b) Capture by Enemy.—When property is captured by a public enemy in time of war, the owner is without remedy.

24. (c) Seizure Under Process.—Property may be seized under judicial process and sold to satisfy a judgment or decree of a court against the owner. Analogous to this, property may be sold to satisfy an unpaid tax. Upon just compensation being made to the owner, property may be taken for public purposes under the state's right of eminent domain.

25. (d) Prescription.—When the owner of land permits another, who is without right, to enjoy privileges therein for a long period of time (usually 20 years or less) the privilege, if unchecked, will ripen into a right, and the owner will thereafter be without power to prevent its exercise. Thus, if B uses a private road across A's land during the statutory period (which

varies in the different states, but is usually 20 years or less) and if such use by B is without license from A and is permitted to continue during all of said period without interruption, A cannot thereafter prevent B using such road. The right to use it will have become vested in B by prescription.

The same rule applies to the exercise of other similar rights, such as the cutting of ice, the flowage of drains, the enjoyment of the light and air entering from another's land.

26. (e) Adverse Possession.—When one takes possession of another's land, claiming title, as for example, where one moves a line fence over upon the lands of his neighbor, claiming that he has placed the fence upon the true line, and if such possession is openly and uninterruptedly continued during the whole statutory period (usually 20 years or less) the adverse possession will ripen into title, and the aggressor cannot be thereafter dispossessed by the true owner.

The purpose of the rule allowing title to arise by prescription and adverse possession is to compel people to act promptly in defense of their rights. The law despises stale claims.

REVIEW QUESTIONS

1. Define Practical Law.
2. What of the necessity of a knowledge of this subject?
3. Give three main purposes of law.
4. What of conflicting interests between the few and the many?
5. Of what does the common law consist, and when do the courts base their opinions upon the common law?
6. How are the courts aided and guided in basing opinions upon the common law?
7. When are laws called statutes, and in what does their advantage over common law consist?
8. From whence does this government derive all its powers?
9. How, primarily, is this consent given?
10. Does each state recognize a similar supreme law, and, if so, what is it called?
11. What can you say of the meaning and the importance of the subject, "The Want of Due Care"?
12. Give ten special cautions for safe dealing.
13. Make clear the difference between proximate and remote causes, and give an example of each.
14. Name five points constituting negligence in the writing of negotiable instruments, such as notes, drafts, checks, etc.
15. What may be the consequence if an instrument bearing any of these points of negligence should come into the hands of an innocent third party for value, some changes having been previously made?
16. (a) How many kinds of property? Define each.
(b) What can you say of a person's right to use his own property?
(c) Of his right to defend his own property?
17. Define:
(a) Trover.
(b) Replevin.
18. Tell what you can regarding the title to property lost.
19. Name four ways in which property may lawfully be destroyed.
20. Give an example of each.

PROBLEMS

1. The construction department of a city is digging a sewer across a street in a portion of the city that is reasonably well lighted in the night. The open sewer is left without a red light or other warning, although there is room for vehicles to pass on one side of

the sewer. In the night A, driving his automobile at a rate of speed within the legal limit, runs into the sewer and is injured. Can he recover from the city? Would it make any difference if he had been running at a rate of speed beyond the legal limit? *Yes.*

2. A mistakes a fast passenger train for a local, and running up the track as the fast train is leaving the station he attempts to board it, falls and has his leg severed. Is the railroad liable? *No.*

3. A is made severely ill and physically incapacitated for some time by taking medicine obtained on a physician's prescription. The medicine is analyzed, and it is found that the pharmacist who compounded it made a mistake in one of the ingredients, thus causing the illness. Is the pharmacist liable? *Yes.*

4. A has been using a wheelbarrow in cleaning his yard. He leaves the wheelbarrow standing on the sidewalk, and in the evening, B passing by falls over it and is injured. Is A liable? *Yes.*

5. A carpenter working on a high building negligently drops a heavy timber, striking and injuring A. Is the carpenter liable? Is the employer of the carpenter liable? *Yes.*

6. A is employed by B to repair an automobile. Because the work was done negligently B is injured. Is A liable? *No.*

7. Owing to the negligence of A in operating a jitney automobile B is injured. Is A liable? *Yes.*

8. A, an employee in a factory, is injured by getting his hand caught in a pulley. It is shown that employees have been warned to keep away from this pulley, and that it was not necessary for A to be near it in the performance of his regular duties. Is the owner of the factory liable?

9. A street car is wrecked. A in attempting to drag B from the wreck dislocates B's shoulder. Is A liable? *No.*

10. A gives B the following check: B endorses the check, and transfers it to C. C changes it like the second form. Is A liable for the amount shown in the second form? *Yes.*

No. 128

DES MOINES, IOWA, Sept. 1, 1916

CENTRAL STATE BANK 33-17

312-314 FIFTH STREET

PAY TO THE
ORDER OF

W. B. Phillips

\$ 15

Fifteen

DOLLARS

A. M. Johnson

No. 128DES MOINES, IOWA, Sept. 1, 1916**CENTRAL STATE BANK** 33-17

312-314 FIFTH STREET

**PAY TO THE
ORDER OF**W. B. Phillips\$ 1500Fifteen Hundred ~~~~~ **DOLLARS**A. M. Johnson

11. An employee in a second-hand clothing store found a diamond ring in the pocket of a vest he was pressing. Did the ring belong to the finder or to the employer? *Let the finder keep it.*

12. A, employed to dig a well for B, found a can of gold pieces buried in the ground. Did the money belong to A or B? *Let B keep it.*

CONTRACTS,
Their Formation, Interpretation and
Termination.

CHAPTER III.

CONTRACTS.

Their Formation.

27. Importance of Subject.—A Contract is an *enforcible* agreement. All contracts *may be* reduced to writing. Some contracts *must be* in writing. But in those cases in which contracts are not required by law to be written, they are *equally binding if made orally*. One general objection to oral contracts is their uncertainty. It is often difficult and, sometimes, impossible to prove what was said by the parties when the contract was made.

Practically all business is transacted by means of contracts. The law of contracts governs all commercial dealings, from the simplest to the most complex. Every time a newsboy sells and delivers a paper, a contract is made and executed. The workman markets his labor and skill, the merchant buys and sells his wares, the banker receives and lends money, the financier effects his great industrial combinations, by *contract*.

Some subjects of the law are chiefly the concern of lawyers, but *this subject concerns everyone*. It is important that all persons become able to distinguish between contracts which are legally good and those which are legally bad. Inability to do this means inability to act promptly in matters of business; it means want of independence; it means lost opportunities; it means uncertainty, danger and delay. Fortunately, the subject is not difficult. Any attentive student can readily grasp its governing principles.

28. The Meaning of "Enforcible."—We have said that a contract is an enforcible agreement. By "enforcible" we mean *legally* binding. Many agreements give rise to *moral* obligations, although, legally, they are nullities. Thus, a promise to attend a dinner or a ball as a guest, although morally binding, is legally void. Courts confine themselves to the adjustment of *substantial* rights; they cannot spend their time in correcting mere breaches of social courtesy.

Again, if A were to make an unwritten agreement to sell B a certain piece of *land*, a moral obligation would thereby arise, yet the promise would be unenforcible, because a contract for the sale of land, to be binding, *must be in writing*.

A contract is enforcible when it is of such a character that a court will require, either its performance, or payment of damages for its non-performance.

29. Classes of Contracts.—For convenience, contracts are divided into three classes, namely, valid contracts, voidable contracts, and void contracts.

(a) A Valid Contract is one which is unqualifiedly enforcible.

(b) A Voidable Contract is one which is so defective that one or both the parties to it may lawfully disregard it. Thus, a contract, for things not necessities, made with one who is under the age of twenty-one years, is voidable, for he may perform it or repudiate it at will.

(c) A Void Contract is one that is wholly unenforcible. It is really no contract at all. Thus, an agreement to do an act prohibited by law would be void. The law will not enforce its own violation.

30. Forms of Contracts.—As to form, contracts are either written or unwritten.

(a) Written Contracts may be expressed in documents, letters or telegrams.

(b) Unwritten Contracts may be expressed in spoken words or in acts. An unwritten contract expressed in spoken

words is called a verbal, oral or parol contract. These terms are identical in meaning.

A contract expressed in words, whether spoken or written, is called an Express Contract. A contract arising from acts is called an Implied Contract.

31. A Simple Contract.—The following example of a simple contract is inserted for the purpose of pointing out the elements which render it, in form, an enforceable agreement. The parenthetical letters indicate distinct parts of the contract, afterwards explained.

THIS AGREEMENT, (a) Made (b) this first day of January, A. D. 1906, by and between (c) John Doe, of the city of Chicago, Cook County, State of Illinois, as party of the first part, and Richard Roe, of the same place, as party of the second part, for and in consideration (d) of the mutual promises and agreements herein set forth, WITNESSETH, (e)

First. That the said party of the first part hereby hires and employs the said party of the second part to act in the capacity of chief accountant in the wholesale carpet house of said party of the first part, for and during a period of one year from and after this date, at a salary of two hundred dollars per month, payable monthly.

Second. That said party of the second part hereby accepts and agrees upon said employment for the period of time and at the salary above stipulated, and further agrees to devote to the duties of said employment exclusively, all and his best skill, ability and endeavor.

IN TESTIMONY WHEREOF, The parties hereto have hereunto set their hands the day and year first above written.

Witness:

JOHN DOE.

RICHARD ROE.

GRANT WHITE.

Examination of this brief contract discloses that it sets forth (a) an agreement, (b) properly made and expressed (c) between two parties, (d) upon a sufficient consideration, (e) to do a certain, lawful thing. Now, if we ascertain that the parties were capable of contracting, we shall be sure that the contract, if honestly made, is valid. We say "if honestly made" because fraud renders a contract voidable at the option of the party defrauded.

32. Testing a Contract.—All contracts maybe judged by the same standards that we have applied to this one. *Every valid contract is (a) an agreement, (b) properly made and expressed (c) between competent parties, (d) upon a sufficient consideration, (e) to do or not to do a certain, lawful thing.*

In passing upon the validity of a contract, we must ask and answer the following questions:

- (a) Was there an agreement?
- (b) Was the agreement properly made and expressed?
- (c) Was the agreement between *competent* parties?
- (d) Was the agreement founded upon a sufficient consideration?
- (e) Was the agreement to do or not to do a *certain* thing?
- (f) Was the object of the agreement lawful?

If the correct answer to each of these questions is "yes," we may be sure that the contract under examination is valid. If the answer to some of the questions is "yes" and to others "no," we may be sure that the contract is either voidable or void, according to the seriousness of the defect. Let us now proceed to learn how to correctly answer these questions.

CHAPTER IV.

AGREEMENT.

33. When Agreement Occurs.—Agreement occurs when the minds of the contracting parties meet upon an *identical* purpose. Without an agreement there can be no valid contract.

34. Difference Between Agreement and Contract.—“Agreement” is a broader term than “contract.” All valid contracts are agreements, but not all agreements are valid contracts. Thus, an agreement to do something which is unlawful or against public policy would not amount to a valid contract, because courts will not enforce violations of the law nor acts which will work public injury.

35. How Agreement is Attained.—Contractual agreement always results from an offer on the one side, and acceptance of the offer on the other. Both offer and acceptance may be by words or by acts.

If I say to A, “I will give you \$200 for your horse,” and if A replies, “I will accept it,” an agreement results, for our minds have met upon an identical purpose. But if, instead of accepting my offer, he replies, “I will take \$250 for the horse,” there is no agreement, for, in that case, our purposes are different, his being to sell for \$250 and mine being to purchase for \$200. In fact, A’s reply that he “will take \$250 for the horse” is itself an *offer*. If I accept it, an agreement will result, for our minds will have met at last upon an identical purpose, namely, that ownership of the horse shall pass to me upon payment of \$250.

It should be remembered that agreement is but one of the *several* elements of a contract. While, without an agreement,

there can be no contract, there may be an agreement and still no contract, if other essentials are wanting.

36. Offer.—There are two kinds of offers,

- (a) An offer to receive an offer, and
- (b) An offer to receive an acceptance.

Acceptance of an offer to receive an offer does not give rise to an agreement. Thus, if A were to write to B, saying: "I have some prime butter which I am selling at 20 cents per pound. Would you like some," B could not bind A to deliver him butter by sending A an order therefor. B's order would amount to a mere offer, and would not become effective for any purpose until accepted by A. On the same principle, newspaper advertisements, describing goods and quoting prices are mere offers to receive offers, unless they invite definite acceptance. For example, an advertisement in the following terms is a mere offer to receive offers: "We have a choice assortment of silks at \$1 per yard." But if this advertisement were changed to read: "Send us \$5 and we will send you 5 yards of our best, black China silk," it would amount to an offer for an acceptance. One who complied with the terms of such an offer would be entitled to receive, either the silk ordered, or damages for the breach of the contract.

So if A, in the first example above given, had written to B saying, "I will ship you 1,000 pounds of prime butter at 20 cents per pound, delivered," B's acceptance would have bound A. The offer would have been an offer for an acceptance. When such an offer is accepted, an agreement results.

37. Acceptance.—Acceptance, to be effectual, must be coextensive with the offer. A qualified or conditional acceptance is merely a new offer and must be itself accepted before an agreement will result.

ILLUSTRATION.—Stephenson offered Johnson & Wheeler 200 boxes of cheese, to be delivered at a certain time, place and price. Johnson & Wheeler accepted the offer as to quantity, price and place of delivery, but not as to *time of delivery*. The court held that there was no

agreement. The acceptance was not coextensive with the offer, hence the minds of the parties had not met upon an identical purpose.

Johnson v. Stephenson, 26 Mich., 62.

If an offer fixes a time within which it is to be accepted, acceptance cannot be made after the time limited has expired. If an offer fixes no time within which it is to be accepted, it will be held to continue a *reasonable* time, and acceptance within a reasonable time will be binding.

If an offer is to be accepted in a certain manner, as, for example, by telegram, acceptance in some other manner, as, for example, by mail, will be ineffectual.

A provision in an offer that silence shall be construed to mean acceptance is not binding upon the offeree. The offerer can impose no such obligation. The offeree may ignore the offer if he chooses. An unaccepted offer gives rise to no duty on the part of the one to whom it is made.

38. Revocation.—An offer may be withdrawn (or revoked) at any time before acceptance. After acceptance it is irrevocable.

When an offerer fixes a time within which his offer may be accepted, he may, until acceptance, revoke at will before the time has expired, unless he has received a consideration for holding the offer open.

39. Cancellation of Orders.—It is not an unusual occurrence for a traveling sales agent, by the exercise of his trained powers of persuasion, to induce persons to give orders for articles which, upon sober afterthought, are found undesirable or unnecessary. If such orders are taken subject to the approval of the agent's principal, or "house," as is generally the case, the deluded purchaser has a means of escape from his bad bargain, provided he acts with sufficient promptness. His remedy is to countermand the order immediately by telephone or by telegraph, or by any other means that will bring his revocation of the order to the attention of the

agent's principal before the latter has had time to make acceptance. The authority of a traveling sales agent is usually merely to make an offer to receive an offer (see sec. 36) and not to make an offer to receive an acceptance. This is always the case when the house reserves the right to accept or reject all orders that the agent procures. Such orders are *merely offers*, and, on the principle stated (see sec. 38) may be revoked at any time before acceptance. This is true even when the order expressly provides that "it shall not be subject to countermand."

ILLUSTRATION.—Fort, an agent, secured from Freese & Rohde an order for a cash register. The order was in writing, signed by Freese & Rohde, and contained the following clause: "This order is given subject to your (the seller's) approval, and it is expressly agreed that it shall not be subject to countermand." *Before acceptance* of the order or shipment of the register, Fort's principal (i. e., the house for which Fort acted as salesman) received the following letter:

"Dear Sir: You received an order from us for one Peck Register from your man, O. W. Fort. Please hold the same until further notice."

(Signed) "FREESE & ROHDE."

The court held that the countermand was sufficient, and that Freese & Rohde were under no legal obligation to accept or pay for the register.

Peck v. Freese, 101 Mich., 321.

40. Offer, Acceptance and Revocation by Mail and Telegraph.—When an offer is made by mail, the offer continues open until the letter is received, and for a reasonable time thereafter, unless sooner revoked. Thus, an offer made by mail might be revoked by a telegram, or even by a subsequent letter, provided the revocation reached the offeree before acceptance of the offer. If the revocation failed to reach the offeree until after he had accepted the offer, it would be too late. Revocation by mail becomes operative when the letter of revocation is *received by the offeree*, and not before. Acceptance by mail becomes binding when the letter of acceptance is *mailed*. If A, in Chicago, were to make B, in Detroit, an offer on January 1st, and if B were to mail his acceptance of the offer on the morning of January 4th, a letter of revoca-

tion mailed by A on January 3d and received by B on the afternoon of January 4th would be wholly ineffectual. Were A to communicate his revocation to B on January 3d by telephone or telegram, it is evident that he might forestall the acceptance. *Revocation should always be made by the quickest means.*

A letter of acceptance, properly mailed, is binding upon the offerer, although he may never receive it. The minds of the parties are held to have met at the moment the letter of acceptance is mailed, and an agreement has therefore been made, although the letter may be afterwards lost. But a letter of revocation is wholly inoperative until it has reached the offeree.

Similar rules are applied to *telegrams* of acceptance and revocation.

CHAPTER V.

MAKING AND EXPRESSING THE AGREEMENT.

41. Two Dangers.—An agreement may be reached, the minds of the parties may have met upon an identical purpose, and yet a valid contract may fail to arise (a) because the agreement was made at an improper time, or (b) because it was improperly expressed.

42. Improper Time.—By statute in most of the states, contracts made on Sunday are void. (Thus, if A sells his horse to B on Sunday on credit the courts will not assist A to collect the purchase price.) In many states the courts will not aid either party under an unlawful Sunday contract, but will leave them where they have placed themselves by their illegal transaction.

43. Contracts Improperly Expressed.—If a contract is oral when the law requires it be in writing, it will be either voidable or void. All contracts may lawfully be made orally, unless some statute provides otherwise. The difficulty is that all states have statutes requiring certain important contracts to be in writing. The purpose of these statutes is to require the preservation of accurate proof of what was actually agreed upon. (Human memory is fallible) It is often biased by selfish interests. Several centuries ago it was observed that verbal contracts were a source of many frauds and perjuries. So, during the reign of Charles II., a statute was passed in England, entitled "An Act for the Prevention of Frauds and Perjuries." This statute made several classes of contracts void unless preserved in writing. Nearly every state in the Union has adopted a Statute of Frauds modeled, to some extent, upon this ancient act.

Under the Statute of Frauds in most states the following classes of contracts are required to be in writing:

- (a) Contracts which cannot be performed within one year.
- (b) Contracts to pay the debt of another.
- (c) Contracts made in consideration of marriage, except mutual promises to marry.
- (d) Contracts for the sale of any interest in land.
- (e) Contracts for the sale of personal property at a price exceeding \$50.

Such contracts, unless in writing, are usually unenforceable.

44. Contracts which Cannot be Performed Within One Year.—When a contract cannot by any possibility be performed within one year, it must be in writing. Thus, a contract to purchase the output of a factory for three years would be void if merely verbal. But if, by any possibility, a contract may be performed within one year, it need not be in writing, although performance within that time is not expected and does not take place. Thus, a contract to support another during life need not be in writing, for death may occur within the year.

ILLUSTRATIONS.—(I) Palmer entered into a contract August 8, 1872, for employment for one year to begin August 14, 1872. This made the contract require one year and six days for its performance. The agreement, being verbal, was held void.

Palmer v. Marquette & Pacific Rolling Mill Co., 32 Mich., 274.

(II) In settlement of a claim, Wood received from a railroad company an agreement, made orally, to issue him a pass annually for ten years. The pass was to be valid for the use of himself and his family, but *for no one else*. It was clearly the intent of the parties that, if Wood and his family were to die within the ten years, no more passes should issue. Death of all being possible within one year, the oral contract was held binding.

Railroad Co. v. Wood, 88 Texas, 191.

45. Contracts to Pay the Debt of Another.—A verbal promise to pay the debt of another is void. Thus, a promise made by a widow to pay the debt of her deceased husband would be unenforceable, unless in writing.

If A says to B, "Let C have goods and, if he does not pay for them, I will," A's promise is to pay the debt of another. If unwritten, it will be void.

But if A says to B, "Let C have goods and charge them to my account," A will be bound whether the contract is oral or written, for *the debt is his own*.

ILLUSTRATION.—Chappell, a physician, was employed by Barkley, and, up to March 11, 1887, rendered services amounting to \$27. On that date, Barkley's son said to Chappell, "Charge this bill to me, together with what you do afterwards." Services to the amount of \$11 were rendered thereafter. The son failed to make payment, and Chappell sued him for the whole \$38 earned.

The court held that the services rendered up to March 11, 1887, were not chargeable to the son under his unwritten promise to pay for them, for this was really a promise to pay the debt of his father, and was void under the Statute of Frauds. But judgment was rendered against the son for the \$11 earned thereafter, for that sum represented services performed at the son's request and was, therefore, the son's own debt.

Chappell v. Barkley, 90 Mich., 35.

46. Contracts Made in Consideration of Marriage.—

Mutual promises to marry need not be in writing. Were A to say to B, "Will you marry me," and were B to reply, "I will," a valid promise would be properly expressed. For breach of this promise, the injured party would be entitled to recover damages.

But if A were to say to B, "If you will marry me I will give you \$1,000," B could not compel A to pay over the money, either before or after marriage, unless the contract were reduced to writing.

ILLUSTRATION.—Hunt verbally promised a woman to pay her \$5,000, a weekly income, and a portion in his will if she would become his wife. She agreed to this and they were married. Hunt failed to perform the agreement, and the court held that, because the agreement was oral, it could not be enforced.

Hunt v. Hunt, 171 N. Y., 396.

47. Contracts for the Sale of any Interest in Land.—

One cannot make a valid verbal agreement to sell land or any

interest in land. Even though a part of the purchase price is paid, such a verbal agreement will be void. The purchase price may be recovered back, but nothing more can be done.

ILLUSTRATION.—Thompson made a verbal contract with the New South Coal Company for the purchase of a piece of land, and paid \$250 on the purchase price. The company afterwards refused to perform the contract. It was held by the court that Thompson could recover his \$250, but that he could not, upon payment of the remainder of the purchase price, compel the company to deed him the land.

Thompson v. New South Coal Co., 135 Alabama, 630.

48. Standing Timber.—Standing timber is an interest in land, hence a contract for the purchase of standing timber will be void, unless made in writing.

49. Contracts for the Sale of Personal Property.—Contracts for the sale of personal property exceeding in value a certain sum, must, in nearly all of the states, be in writing or remain unenforceable. In a majority of the states, verbal contracts for the sale of personal property up to \$50 in value are valid. But this sum varies. In Delaware it is \$25, while in Louisiana it is \$500. (See title Statute of Frauds, Table A, Appendix.)

Michigan \$100

50. Contracts for Services.—While, for some purposes, services are property, verbal contracts for services exceeding \$50 (or the statutory limit, whatever it may be) may be lawfully made. The statute applies to sales of *goods, wares and merchandise only*. It does not apply to contracts for services.

ILLUSTRATION.—Turner was employed by Mason, under a verbal contract, to paint two portraits at a price (as Mason testified) of \$150. Turner's services as an artist were the thing contracted for. It was held that the agreement was not void under a statute requiring contracts for the sale of goods, wares and merchandise exceeding \$50 in price to be in writing.

Turner v. Mason, 65 Mich., 662.

51. Payment and Delivery.—Contracts for the sale of personal property exceeding in value the statutory limit *need*

not be in writing, if a part of the purchase price is paid. Payment "binds the bargain." Thus if A bought goods to the amount of \$1,000 from B and paid even \$1 upon the purchase price, the contract would be enforceable as to both parties, even though it were verbal only.

In like manner delivery and acceptance of a part of the property bought will bind the bargain.

ILLUSTRATION.—Gilbert sold Lichtenberg a quantity of onions amounting in value to a sum far exceeding \$50. The contract was verbal. Two carloads of the onions were delivered to Lichtenberg (and were by him accepted. He rejected the third car, claiming that the contract was void under the Statute of Frauds, because verbal. The court held that delivery and acceptance of goods under the contract made the contract as valid and binding as though it were in writing.

Gilbert v. Lichtenberg, 96 Mich., 417.

52. Putting the Contract into Writing.—When a contract must be written to be valid, the Statute of Frauds in most states merely requires that "some memorandum of the contract shall be made in writing signed by the party to be charged." No special form is necessary. The law is for the protection of all who transact business. Many of these are unskilled in drafting legal documents. Therefore the statute asks nothing more formal than a simple record which any intelligent person should be able to prepare. The memorandum may consist of signed orders, or of letters, or of telegrams, or of all or any of these. One thing however is demanded: the writing or writings embodying the contract must set forth the essential terms of the agreement so that the intent of the parties may be fully gathered therefrom. The memorandum cannot be supplemented by verbal explanations.

53. Contents of Memorandum.—While not always necessary, it is always safest to so prepare the memorandum that it will show all of the following facts:

- (a) Date of making.
- (b) Date of performance.
- (c) Names of both parties.

(d) Accurate description of property sold or thing to be done.

(e) Consideration.

(f) Signatures of both parties affixed by themselves or by their authorized agents.

In writing letters or telegrams intended to operate as written contracts, care should always be taken to include as many of these points as, under the circumstances, can be covered.

ILLUSTRATION.—(I) Lewis offered E. C. Hawes and sister \$1,450 for their interest in a certain piece of land in Cambridge, Mass. The offerees sent Lewis the following letter:

“E. Weymouth, Mar. 24, 1890.

Dear Sir: My sister and I have decided to accept the offer of \$1,450 for our interest in the Cambridge property now under discussion.
Resp.

E. C. HAWES.”

These owners afterwards declined to convey the property to Lewis and he brought suit to compel them to do so.

As this was clearly a contract for sale of an interest in lands, it was necessary for Lewis to produce a sufficient memorandum in writing. He produced the foregoing letter. The court held that the letter was insufficient for the purpose; that it did not contain the essential terms of the agreement; that the omission to describe the property and to name the purchaser in the letter were fatal defects. For these reasons the court declined to enforce the contract.

Lewis v. Wood, 153 Mass., 321.

(II) Heffron bought from Armsby, through Rudell, the latter's agent, certain corn, and received from Rudell the following memorandum in writing:

“Detroit, May 9, 1881.

John Heffron bought of J. H. Rudell, agent for A. K. Armsby, three hundred cases of B. M. corn, \$1.25 cash, less one half per cent.

(Signed) J. H. RUDELL.

Armsby failed to deliver the corn and Heffron was obliged to purchase at an increased price. Heffron brought suit to recover as damages the difference between the contract price and the increased price which he had been obliged to pay. Armsby contended that the

foregoing memorandum was insufficient, and that the transaction was therefore void under the Statute of Frauds. But *the court held that the memorandum was sufficient*. Heffron was permitted to recover the damages claimed.

Heffron v. Armsby, 61 Mich., 505.

54. Signing the Memorandum.—The Statute of Frauds requires the memorandum in writing to be signed by the party to be charged. It need not be signed by *both* parties. The agreement will be enforceable against the party who signs and unenforceable against the party who does not sign. From this it is evident that each party should require a complete and valid memorandum in some form, signed by the opposite party. When an important verbal order is taken, its written confirmation should be required. When an important verbal order is given, its written acceptance should be obtained.

55. Signing by Agent.—The required memorandum may be signed by the parties in person, or by agent. In the case of Heffron v. Armsby (see sec. 53) we saw a signature by an agent sustained by the court. The signing in that case was in crude form. It should have read

J. K. ARMSBY,
by J. H. RUDELL, Agent.

Yet, because the intent of the parties was clear, the signing was treated as sufficient.

In most states, written authority is required to enable an agent to execute a contract relating to land. Verbal authority is generally sufficient in all other cases.

CHAPTER VI.

COMPETENCY OF PARTIES.

56. Incompetent Parties.—Contracts made by the following classes of persons are generally either void or voidable:

- (a) Infants,
- (b) Lunatics and drunken persons,
- (c) Persons under duress,
- (d) Married women.

57. (a) Infants.—An Infant is a person under the age of twenty-one years. Contracts made by infants (except for necessities) are voidable at the option of the infant. The law presumes that one who has not reached the age of majority is too inexperienced to be able to deal safely. The law therefore says, in effect, “Those who deal with an infant must do so at their own peril.” If the infant is satisfied with his bargain and desires to enforce the contract, he may; but if he is dissatisfied, he may repudiate the contract, and the courts must sustain him in so doing.” An infant cannot be held upon a contract, even though the agreement is perfectly fair and clearly beneficial to his interests, unless the contract is for necessities.

ILLUSTRATION.—Widrig, an infant, entered into a contract with Taggart whereby Widrig was to work on Taggart’s farm for a period of seven months. Just before harvest and in violation of his contract, Widrig left Taggart’s service. The court enforced Widrig’s claim for services, but refused to permit Taggart to recover the damages he had sustained through Widrig’s breach of contract.

Widrig v. Taggart, 51 Mich., 103.

58. Necessaries.—An infant may bind himself upon a contract for necessaries to the same extent as though he were an adult. Were this not so, a friendless infant might suffer or even perish for want of ability to contract for food, clothing and shelter.

To be necessaries, the articles furnished or money advanced must be *actually necessary* in the particular case. Board, lodging, food, medicine and education are necessaries. But those things which are merely for ornament or for pleasure are *not* necessaries.

The fact that the thing furnished was useful and was in the nature of a necessary will not sustain the contract, unless the thing furnished was, in point of fact, necessary to the infant *at the time it was supplied*. Thus, one who supplies food, clothing or lodging to an infant who is not in need of them, or to an infant who is provided with these things by his parent or guardian, cannot hold the infant responsible for payment.

ILLUSTRATION.—An infant attending Yale rented a room for the college term of forty weeks. After a brief occupancy, he paid up all of the rent then due and took lodgings elsewhere. The landlord afterwards attempted to collect rent for the whole term, maintaining that the room was a necessary and that the infant was therefore bound to pay for the full time covered by his contract. The court held that the room was necessary to the infant so long as he needed it, and no longer, and that, when the infant was provided with lodgings elsewhere the room first rented ceased to be necessary to him. The moment the room ceased to be necessary, the infant's contract ceased to be binding upon him. The landlord was not permitted to recover further rent.

Gregory v. Lee, 64 Conn., 407.

59. Disaffirmance.—The courts are all agreed that an infant cannot be held upon his contract *while he remains an infant*, unless the contract is for necessaries. But when a person attains the age of twenty-one years, is he bound by the contracts that he has made during infancy? To this question the courts of some of the states reply, "Yes, he is bound by his contracts made during infancy, unless, upon attaining his

majority, he DISAFFIRMS them within a **reasonable time**." The courts of other states say: "No, he is not bound by his contracts made during infancy, unless, upon attaining his majority, he RATIFIES them." This conflict of opinion makes it necessary to refer the student to the law as it exists in his own state.

60. Return of Property.—When one seeks to disaffirm a contract on the ground that he was an infant when he made it, he must return so much of the consideration received by him as remained in his hands upon attainment of his majority. He cannot both keep the property and disaffirm the contract. Retention of the property is a ratification of the contract. By retaining the property gained under a contract during infancy, the adult elects to be bound.

If an infant purchases property and *disposes of it during infancy* he is not obliged to return either the property or its value in order to be able to disaffirm the contract. But retention of any part of the property after attaining majority will amount to a ratification of the whole contract.

ILLUSTRATIONS.—(I) An infant sold land for \$240 and invested the proceeds in a piano. On coming of age, he demanded back the land. The purchaser contended that, if he returned the land he should receive the piano. The court decided that the infant could both recover the land and retain the piano, as the \$240 in money, and not the piano, was what he had received for the property. The money having been spent, return of it could not be required.

Englebert v. Prichett, 40 Nebraska, 195.

(II) An infant purchased land and gave a mortgage upon it back to the grantor to secure payment of the purchase price. On coming of age, the grantee, who still held the land, attempted to disaffirm the mortgage on the plea that it was given during infancy. The court held that the grantee could not retain the direct benefits and shirk the burdens of his contract; he could not avoid the mortgage without first tendering back the land.

Young v. McKee, 13 Mich., 552.

61. Fraud of Infant.—If an infant represents that he is of full age, and obtains contractual benefits thereby, he may be

held liable *for his fraud* if he afterwards avoids the contract on the ground of infancy.

ILLUSTRATION.—An infant, by representing himself to be past twenty-one years of age, purchased goods (not necessities) and gave his note for the purchase price. He afterwards avoided the note by pleading infancy. The seller of the goods then sued the infant for the fraud and was permitted to recover damages.

Burley v. Russell, 10 N. H., 184.

62. (b) Lunatics and Drunken Persons.—Drunkenness is regarded as a temporary lunacy. Intoxicated persons and lunatics are under like contractual disability.

The general rule is that the contract of a lunatic or of a drunken person is voidable at his option, *provided* that, at the time of the transaction, he was incapable of understanding the meaning and effect of his act, and *provided* that his condition was known to the person who dealt with him. If the lunatic or drunken person had sufficient use of his faculties to understand the nature and effect of his act at the time of the transaction, the contract will be valid. So too if the contract was made by one who *did not know* the condition of the lunatic or drunken person, and who *acted fairly* and took *no undue advantage*, the transaction will be upheld.

ILLUSTRATION.—Falch bought two barrels of liquor in 1894 from a vendor who made a fair bargain and who did not know that Falch was insane. Afterwards Falch was adjudged insane, and an attempt was made to escape payment for the liquor on the ground that the contract was avoided by the fact that Falch was a lunatic when the purchase was made. The court held that this could not be done. The contract was sustained.

Falch v. Gottchalk, 88 Md., 368.

63. Bad Faith.—When a contract is made with a weak minded person, a lunatic or a drunken person, under circumstances showing bad faith on the part of the other party, the transaction will be generally set aside. Thus, unconscionable contracts made with persons whose mental powers have been impaired by sickness or old age are often set aside by the courts.

If A were to induce B to become intoxicated, and were then to make a contract with B to B's great disadvantage, the contract would be voidable at B's option.

64. Necessaries.—Contracts for necessities supplied in good faith to lunatics and drunken persons are enforceable.

65. Lunatics Under Guardianship.—The contracts of a lunatic (except for necessities) made while under guardianship are void.

66. (c) Duress.—Duress is compulsion by acts or threats giving rise to fear of serious injury. Contracts made under duress are voidable at the option of the injured party. When a person is deprived of the free exercise of his will by great fear of imprisonment, bodily injury, destruction of property, or harm to his family, there can be no true meeting of the minds of the parties. Without this, there can be no agreement. Without agreement, there can be no valid contract.

ILLUSTRATION.—Sherman, claiming to have been injured by eating defective meat sold to him by Galusha, sued the latter for \$5,000 damages and then, threatening him with prosecution and imprisonment if he refused, induced Galusha, when thus under fear, to settle the case by executing to Sherman a note of \$1,000 secured by a mortgage covering Galusha's farm. At Galusha's request, the court declared the note and mortgage void.

Galusha v. Sherman, 105 Wis., 263.

67. (d) Contracts of Married Women.—The power of a married woman to make contracts is statutory. At common law she was unable to contract.

An unmarried woman possesses the same contractual powers as a man. When the husband of a married woman dies, her power to make contracts is thereby immediately revived. The same is true if the marriage is terminated in any other manner.

By statute in nearly all of the states, a married woman may conduct any business in her own name and may make bind-

ing contracts in relation thereto. But many of the states deny her the right to become a surety for another, or to bind herself by any contract not relating to her separate and individual property. (As to contractual powers of married women in the several states, see Appendix, Table B.)

68. Necessaries.—By reason of his legal obligation to support her, a married woman may bind her husband's credit for necessities. But, as in the case of an infant, the articles purchased must be necessities. If she is already sufficiently provided, she cannot bind her husband's credit for more.

ILLUSTRATION.—A married woman whose husband provided her with all needful things by her requested, went to a store and bought goods to the amount of about \$200, having them charged to her husband. He had no account with the store where the goods were purchased, nor had he given his wife authority to purchase goods there in his name. The goods bought were mainly useful, and, had his wife been unprovided, would have been in the nature of necessities. But, *because she was already fully provided*, the court held that the goods were not necessities, and that their value could not be collected from the husband.

Clark v. Cox, 31 Mich., 204.

CHAPTER VII.

CONSIDERATION.

69. The Meaning of Consideration.—The thing given by each party to the other as the inducement for the contract is called Consideration. Thus, A bought a horse from B for \$300. The consideration moving to A was the horse. The consideration moving to B was the \$300.

70. Absence of Consideration.—Contracts to give something for nothing are void. Consideration is the foundation of the contract; without it the contract must fall. Thus, if A were to give B, gratuitously, an option for the purchase of land belonging to A, B could not enforce the option contract. But if B had paid A something of value for the option, even a small sum, as, for example \$1, the option contract would be enforceable.*

71. Good Consideration.—The following things are held to be good considerations:

- (a) Money and things of value.
- (b) Mutual promises.
- (c) Acts and forbearances.
- (d) Natural love and affection.

72. (a) Money and Things of Value.—The exchange of value for value is the commonest form of consideration. The values need not be commensurate. In the absence of bad faith or fraud, the courts will not inquire into the adequacy of the consideration, but will leave the parties where they have placed themselves by their own bargain.

73. (b) Mutual Promises.—Mutual promises creating reciprocal obligations form a good consideration.

ILLUSTRATION.—Certain merchants residing in Russellville, Ky., joined in signing the following agreement:

"We, the undersigned merchants of Russellville, do hereby agree and obligate ourselves to close our place of business at 6:30 o'clock (P. M.) beginning May 15, 1895, and lasting until the first of September."

Certain merchants, claiming this agreement to be without consideration, violated it. Suit was brought for its enforcement. The court held that the mutual promises resulting from the signing of the agreement formed a good consideration and that the agreement was, therefore, valid. The contract was enforced.

Stovall v. McCutchen & Co., 107 Ky., 577.

74. (c) Acts and Forbearances.—An act or a forbearance is a good consideration.

ILLUSTRATIONS.—(I) Sallie D. Stemmons entered into a contract with her grandson, Albert R. Talbott, in the following terms:

"April 26th, 1880.

I do promise and bind myself to give my grandson, Albert R. Talbott, five hundred dollars at my death if he will never take another chew of tobacco or smoke another cigar during my life from this date up to my death.

(Signed) ALBERT R. TALBOTT,
SALLIE D. STEMMONS."

Talbott performed the contract. When Mrs. Stemmons died, her executor refused to pay Talbott the \$500, claiming that the contract was without consideration. Talbott brought suit for the sum and the court held that Talbott's forbearance to do a thing which he had a legal right to do (namely to use tobacco in the forms specified) constituted a good consideration. Talbott was awarded the \$500.

Talbott v. Stemmons Executor, 89 Ky., 222.

(II) Ballard was a depositor in the First National Bank of St. Albans, Vermont. Burton was a stockholder and director in the bank. During a run on the bank, Ballard called for his money, but was induced to leave it by Burton, who offered to indorse the bank's certificate of deposit for the amount if Ballard would not then withdraw the funds. The bank afterwards failed and Ballard brought suit against Burton upon the indorsement so given. Burton claimed that the

indorsement was without consideration, but the court held that Ballard's forbearance to withdraw his money was a good consideration, and that Burton's contract of indorsement was, therefore, enforceable.

Ballard v. Burton, 64 Vt., 387.

75. (d) Natural Love and Affection.—Blood relationship, natural love and affection and natural duty are all good considerations. Deeds conveying real estate from parent to child are frequently made "in consideration of love and affection," and such conveyances are valid.

76. Valuable Consideration.—A consideration is said to be "valuable" when it consists of money or of something convertible into money. Marriage is also a valuable consideration. As between the parties to the transaction, a good consideration is sufficient, but to support the transaction as against the adverse interests of creditors, *the consideration must be both good and valuable.*

ILLUSTRATION.—Smith, being indebted to Fellows, conveyed his property to his wife without receiving any valuable consideration for the conveyance. Fellows brought suit to have the conveyance set aside. In deciding the case the court said: "Where a conveyance from a husband to a wife is a voluntary one, without *valuable* consideration, it is void in the law, as against creditors, because it transfers property which they (the creditors) could have reached had no such transfer been made."

Fellows v. Smith, 40 Mich., 689.

CHAPTER VIII.

CERTAINTY AND LEGALITY OF OBJECT.

77. Certainty.—To be enforceable, a contract must be certain in its essential provisions. Courts cannot make agreements for the parties; they cannot render certain that which the parties have left in doubt.

ILLUSTRATION.—Isaac N. Bumpus entered into a contract with his father and mother to remain at home, manage their estate, educate his younger brother and set the younger brother up in such business as the latter should select. For doing all of these things, Isaac was to receive certain advantages. The agreement did not in any manner fix or limit the amount to be expended by Isaac in behalf of his brother. The father and mother refused to perform their part of the contract and Isaac brought suit to compel them. In deciding the case the court said: "The contract itself, as set out, was in some particulars as vague as possible, and especially in all that relates to what was to be done for Myron (the younger brother) in furnishing him an education and assisting him to get a start in business. Whether parties making such a contract would contemplate a cost of one thousand dollars or of twenty thousand dollars, no one but themselves could say: for the one sum might in some cases be made to answer or the other be required. *Courts cannot enforce such contracts.*"

Bumpus v. Bumpus, 53 Mich., 346.

78. Illegal Contracts.—The following classes of contract are void:

- (a) Contracts in violation of law.
- (b) Contracts contrary to public policy.

79. (a) Contracts in Violation of Law.—Courts exist to enforce the law and not to aid its violation. It follows that,

when the object of a contract is unlawful, enforcement of the contract is impossible. The contract is therefore void.

ILLUSTRATION.—In a noted case in which James R. Keene, the famous financier, was interested, and in which Joseph H. Choate, one of the leaders of the American bar, was among the eminent counsel, the following facts and decision were developed: Keene and others had undertaken to “corner the market” in lard, and had entered into a contract for that purpose. This agreement was *in violation of the statutes* of the state. The parties to the transaction finally fell into a dispute among themselves concerning the division of the profits and the matter was taken into court for adjustment. The court declined to interfere, but left the parties to settle their own quarrel. The contract was held to be unenforceable.

Leonard v. Poole, 114 N. Y., 371.

80. (b) Contracts Contrary to Public Policy.—Law seeks to secure the greatest good to the greatest number. The interests of the few must yield to the rights of the many. The courts will not assist a private individual to work a public injury. A contract contravening public welfare is void.

ILLUSTRATIONS.—(I) The Maine Central Railroad Company agreed with the Eastern Express Company to carry express for the latter *exclusively* for a period of four years. During that period another express company requested the Maine Central Railroad Company to transport express for it. The railroad company refused, relying *upon* its contract with the Eastern Express Company as a justification for the refusal. The court held that the contract was *contrary to public policy* and void. Common carriers must afford equal facilities and terms *to all* who offer goods for transportation.

New England Express Company v. Maine Central Railroad Company, 57 Me., 188.

(II) The New England Telephone & Telegraph Company placed a telephone in the office of the Western Union Telegraph Company in Rutland, Vermont, but declined to do likewise for the Commercial Union Telegraph Company in the same city. The refusal was based on the fact that the New England Telephone & Telegraph Company was *forbidden by contract* to place its instruments in the office of any telegraph company without the consent of a certain third party. This

contract was held void because *contrary to the rights of the public*. Telephone companies are public carriers of speech, and they cannot make valid contracts restricting the performance of their duty to the public. They must afford equal facilities and terms to all.

Commercial Union Telegraph Company v. New England Telephone & Telegraph Company, 61 Vt., 241.

(III) Ivey was killed in a collision on the Missouri Pacific Railroad. At the time of his death, he was being transported under a drover's pass containing a contract with the railroad purporting to release the latter from liability for injuries resulting from the negligence of railroad company and its servants. This clause of the contract was held void, as against public policy. The court held that it was contrary to public welfare to permit a railroad company to relieve itself by contract from all liability for negligence. (This is not the law in all states.)

Missouri Pacific R. Co. v. Ivey, 71 Tex., 409.

81. Illegal Contracts.—In most states the following classes of contracts are void by statute. In states having no statute on the subject, such contracts are held void because *contrary to public policy*.

- (a) Contracts in restraint of trade,
- (b) Contracts for the purpose of stifling competition,
- (c) Contracts to influence public officials,
- (d) Gambling contracts,
- (e) Marriage brokerage contracts,
- (f) Usurious contracts,
- (g) Contracts for immoral purposes.

82. (a) Contracts in Restraint of Trade.—A restriction of trade which is not sufficiently sweeping to injure public interest is valid. Thus, when one sells out the good will of a business, it is lawful for him to agree to refrain from re-entering business in competition with the purchaser to the detriment of the good will sold.

ILLUSTRATION.—Tilden, who had been for many years engaged in making and dealing in shirts, collars and cuffs at Des Moines, Iowa, and who had an established trade in these articles throughout Iowa and Nebraska, sold the good will of his business to Swigert & Howard,

agreeing not to re-engage in the same business in Iowa or Nebraska or within one hundred miles of Des Moines for a period of ten years. The court held this contract valid.

Swigert v. Tilden, 121 Ia., 650.

When a contract restrains trade *generally*, or in an unreasonably large territory, or for an unwarrantable length of time, it will be held contrary to public policy, and therefore void.

ILLUSTRATION.—A Michigan firm sold out their stock and material to an Illinois corporation, and agreed not to re-engage, during a period of five years, in the same line of manufacturing in Michigan, Wisconsin, Illinois, Minnesota, Iowa, Missouri, Indiana or Ohio, nor to permit their plant in Michigan to be used for that purpose. This provision was adjudged in restraint of trade and void.

Western Wooden-Ware Association v. Starkey, 84 Mich., 76.

83. (b) Contracts Stifling Competition.—Agreements made for throttling competition, limiting production, and increasing prices are against the interest of the public, and are, for this reason, declared void by the courts.

ILLUSTRATIONS.—(I) Dealers controlling 90% of the blue stone sold in New York, formed a combination known as the Union Blue Stone Company. The purpose of this Company was to limit production, prevent competition among its members, and to advance prices. The contract operating to accomplish these ends was held void.

Cummings v. Union Blue Stone Co., 164 N. Y., 401.

(II) A large number of stenographers in the city of Chicago entered into an agreement for the purpose of increasing the price of their services by preventing the cutting of rates below a fixed standard. Some of the parties to the agreement violated it and suit was brought against them by others. The court held that no damages could be recovered for the violation of the contract, because it was for the suppression of competition, and therefore void.

More v. Bennett, 140 Ill., 69.

84. (c) Contracts to Influence Public Officials.—A contract to render lobbying service, or to influence public officials by indirect and under-handed means, or for a fee contingent upon certain legislation being enacted, is void.

ILLUSTRATION.—Houlton made a contract with Dunn to procure certain legislation from Congress, opening for sale pine lands in Minnesota in a manner which would give Dunn the first right to purchase. The service was successfully performed, the legislation was enacted and Houlton sued Dunn for \$3,500 compensation. The court held that the contract was void and that Houlton could not recover compensation.

Houlton v. Dunn, 60 Minn., 26.

85. (d) Gambling Contracts.—A wager is an agreement to pay upon the happening of an uncertain event. Wagers are in violation of sound morals. Wagering (or gambling) contracts are therefore held void by the courts of nearly every state in the Union. Election bets, bets upon horse races and upon games are almost universally void.

When money has been deposited with a stake holder for the purpose of an unlawful wager, the depositor may recover his money from the stake holder by demanding it at any time before it has been paid to the winner, and this either before or after the bet has been decided. If the stake holder refuses to give back the money on demand, he becomes personally liable for it to the depositor.

ILLUSTRATION.—Hibbard made a bet of \$200 with Carter that Hibbard's team could trot a certain distance in a specified time. Whitwell was stakeholder. Hibbard won the wager. Carter demanded back his \$200, and Whitwell, ignoring Carter's demand, afterwards paid the sum to Hibbard, who had won it. Carter then sued Whitwell for the amount and the court gave judgment against Whitwell in Carter's favor.

Whitwell v. Carter, 4 Mich., 328.

86. (e) Marriage Brokerage.—A contract to procure a wife for another is contrary to public policy and sound morality. Such contracts are void.

ILLUSTRATION.—Autcliff agreed to pay June \$50 for finding the former a wife. June performed the service and brought suit to recover his compensation. The court held that the contract to pay for such service was unenforceable.

Autcliff v. June, 81 Mich., 477.

87. (f) Usurious Contracts.—The maximum rate of interest that may be charged is fixed by statute in most of the states of the Union. When a contract, directly or indirectly, requires payment of a return to the lender, or his agent, exceeding the maximum rate allowed by law, it is said to be usurious. Usury ordinarily works a forfeiture of a part or of all of the interest, and in a few states avoids the contract. (For interest rates and penalties for usury in all states, see Appendix, Table C.)

88. (g) Contracts for Immoral Purposes.—Morality being necessary to public welfare, the courts will not enforce contracts for the furtherance of immoral purposes.

CHAPTER IX.

CONSTRUCTION OF CONTRACTS.

89. Words.—When the parties have put their contract into words, the question arises, ~~What do the words used mean?~~ The act of ascertaining the intent of the parties from the expression they have used is called Construction.

In construing a contract, common words are to be given their plain, obvious and ordinary meaning. Technical words and trade terms are to be given their special significance, unless a different intent is evident from the instrument itself.

Words are construed most strongly against the party using them, as it is presumed that he has used language as favorable as possible to himself. A contract is to be so interpreted to give effect to every word used. When ellipses occur for the sake of brevity, the court may construe the contract as though the omitted expressions had been used.

ILLUSTRATION.—The following note was brought before a court for construction:

“Detroit, July 20, 1855.

One year, August 15th, after date we promise to pay to the order of H. N. Walker \$2,500, at Michigan Insurance Bank, value received with interest.

(Signed) V. A. RIPLEY & Co.”

At the trial it was contended that the words “August 15th” were without meaning, and that the note fell due one year from July 20, 1855, but the court held that these words must be so construed as to make them effective, if possible. The Justices therefore held that the note should be read as though written “one year from August 15 next after date we promise to pay,” etc.

Washington County Bank v. Jerome, 8 Mich., 495.

90. Clerical Errors.—The law supplies omissions caused by errors that are obviously clerical.

ILLUSTRATIONS.—(I) A contract was made for the building of a grand-stand at a race course. The grand-stand was to cost \$133,000 and was to be finished by a certain day. A penalty of \$100 per day was to be paid for every day elapsing between the date set for completion and the date of *actual* completion. In expressing this, substantially the following words were used: "In case said party of the first part shall . . . to fully complete the work within the time limited, he shall pay said party of the second part the sum of \$100 for each and every day of such default."

It was argued that this provision was inoperative because its opening line contained no effective verb. But the court held that the omission of the word "fail" was obviously clerical, and that the line must be construed as though written, "In case said party of the first part shall *fail* to fully perform," etc.

Wallis Iron Works v. Monmouth Park Association,
55 N. J. L., 132.

(II) A note was written "payable five years from date at six and a half per cent per annum, payable semi-annually." The court held that the omission of the words, "with interest" was immaterial, and that the note was to be construed as though written, "with interest at six and one half per cent per annum," etc.

Marston v. Bigelow, 150 Mass., 45.

91. Double Construction.—When a contract is capable of two constructions, the one which will make it operative will be chosen in preference to the one which will make it inoperative.

ILLUSTRATION.—Parties contracted with dealers for sufficient coal to meet their requirements for a given time. Construed as an option to buy coal for future delivery for a speculative purpose, this contract would have been void under an Illinois statute prohibiting such options. Construed as an arrangement to buy such coal as the purchasers required for carrying on their milling business the contract was valid. The court adopted the latter construction.

Minnesota Lumber Co. v. Whitebreast Milling Co., 160 Ill., 85.

92. Satisfaction.—When it is contracted that a certain thing shall be to the satisfaction of another, as, for example,

that certain machinery shall work to the satisfaction of the purchaser, the person whose opinion is to be thus consulted is *the sole judge* of whether or not he is satisfied. If dissatisfied he may cancel the contract.

ILLUSTRATION.—Ellis bought a Plano binder under a written agreement containing the following clause: "The binder is to do good work and give satisfaction." If the binder proved unsatisfactory, it was agreed that Ellis was to return it to the seller and pay for the work it had done during the test. After cutting a quantity of grain, Ellis notified the seller that the machine's work was unsatisfactory. The court held that this decision was binding, and that Ellis could not thereafter be compelled to pay the purchase price.

Plano Manufacturing Co. v. Ellis, 68 Mich., 101

93. Negative Contracts.—When a contract provides that one of the parties to it shall not do a certain thing, breach of the contract may be enjoined by the courts.

ILLUSTRATION.—A singer agreed not to sing elsewhere than at the plaintiff's theatre. While it is evident that the court could not compel the vocalist to sing anywhere, it could and did restrain her from singing elsewhere.

Lumley v. Wagner, 13 Eng. L. & Eq., 252.

94. Reasonable Time.—When an act is promised to be done, and no time of performance is set, the law will say that the act was to be done within a reasonable time.

ILLUSTRATION.—The following note was executed:

"Chicago, Nov. 1, 1883.

For value received I promise to pay to S. F. Smithers \$2,048.25, payable at my convenience and upon this express condition, that I am to be the sole judge of such convenience and time of payment.

(Signed) A. JUNKER.

Suit was brought upon this note, and Junker maintained that the obligation was not due, although more than five years had elapsed since the note had been given. The court held that the note was evidence that the parties intended that Junker was to pay *sometime*, and that,

since no definite time was stated, suit at the end of a *reasonable time* might be brought. The court held that Smithers had waited a reasonable time and that the note was therefore due.

Smithers v. Junker, 41 Fed. Rep., 101.

95. Contracts Partly Written and Partly Printed.—

When a part of a contract is a printed form, and a part is written words, and the written words are in conflict with the printed portion of the contract, the *written words control*.

ILLUSTRATION.—The Mansfield Machine Works sold to the village of Lowell, a fire-engine and attachments. The printed part of the contract showed an absolute sale, but the village attorney had written a conflicting clause in the contract form, showing the sale to be conditioned upon subsequent acceptance of the engine and attachments by the village council. The court held that the contract was therefore conditional.

Mansfield Machine Works v. Common Council, 62 Mich., 546.

96. Writing not Varied by Parol.—

When a contract has been reduced to writing and executed by the parties, all *preliminary* understandings and agreements are merged in the written agreement. To all intents and purposes the preliminary, verbal agreements cease to exist.

ILLUSTRATION.—Johnson rented a farm under a written lease. Later, he attempted to recover damages from the lessors on account of their failure to do certain ditching upon the premises. The lease did not mention the ditching, but Johnson relied upon a verbal agreement which he claimed was made between himself and the lessors at or *before* the time of the execution of the lease. The court held that Johnson must rely upon his written agreement, and that he could not be heard to give evidence of any preliminary verbal understanding.

Diven v. Johnson, 117 Ind., 512.

97. The Law of Place.—

As a general rule, a contract valid where made is valid everywhere, and a contract invalid where made is invalid everywhere.

When a contract is made in one state or country to be performed in another state or country, the law of the place

of performance governs the contract, unless the parties have agreed otherwise.

When a contract is both made and to be performed in one and the same state, the law of the place where the contract is made governs.

CHAPTER X.

TERMINATION OF CONTRACTS.

98. How Contracts are Terminated.—In general, contracts are terminated, by

- (a) Performance,
- (b) Substitution,
- (c) Cancellation,
- (d) Rescission,
- (e) Breach, or
- (f) Limitation.

99. (a) Performance.—When both parties have performed all that they have agreed upon, the contract is at an end.

100. Impossibility of Performance.—If performance becomes impossible by reason of the destruction of the subject matter of the contract, or by reason of the death of one or more of the parties, performance will be excused. But if the impossibility arose through some intervening cause which the parties should have provided against in their contract, performance will not be excused.

ILLUSTRATIONS.—(I) *Performance excused.* A contract is avoided by the subsequent enactment of police regulations, making its performance illegal.

Destruction of a music hall by fire releases both parties from an obligation for the use of the hall for future entertainments.

An agreement to play a piano at a concert is excused by the incapacitating sickness of the promissor.

A contract for the services of an animal is excused by the death of the animal.

(II) *Performance not excused.* An agreement to have a house completed at a certain date is not excused because the house is burned when near completion, for the parties should have provided against such an happening by their contract.

An agreement on the part of a school teacher to teach during a certain term is not vitiated by the fact that the school is necessarily abandoned because of prevalence of an epidemic of small-pox in the community. Such a contingency should have been foreseen and contracted against.

For the same reason inability to furnish promised funds is not excused by a sudden panic.

A contract to deliver goods of a certain quality is not excused because of the impossibility of procuring such goods in the market, or because it is impossible to procure means of transportation.

These examples indicate the necessity for the exercise of forethought in arranging the terms of contracts.

101. (b) Substitution.—By mutual consent, a new contract may be made to wholly take the place of the original agreement. When this is done, the old contract is terminated and the new one is in force. No new consideration is required to support the new contract.

102. (c) Cancellation.—By mutual agreement, the parties may cancel the contract. This may always be done in writing. Moreover, a written agreement may be changed or cancelled by a verbal agreement to that effect, made afterwards, except when the contract is of a class required by law to be in writing.

ILLUSTRATION.—A contractor made an agreement in *writing* to perform certain work for a land owner. Later, the contractor and the land owner agreed *verbally* that the written contract should be cancelled. The court held the verbal agreement valid and that the written agreement was terminated thereby.

Blangborne v. Hunger, 101 Mich., 375.

103. (d) Rescission.—A contract is voidable when one or both parties to it have the right to either treat it as binding, or to disaffirm and repudiate it at pleasure. The act of disaffirmance is called Rescission.

Thus, the voidable contract of a minor with an adult may be either enforced against the adult or repudiated by the infant, as the infant chooses.

Contracts made under duress, and the voidable contracts of married women, lunatics and drunken persons may be rescinded.

Contracts in which the opposite party has defaulted may be rescinded.

Contracts induced by fraud, false representations, and mutual mistake of facts are subject to rescission.

104. Fraud.—The *intentional* and *successful* employment of any cunning, deception, or artifice used to circumvent or cheat another is Fraud.

ILLUSTRATION.—Gibbs, a man of defective eyesight, signed three instruments, two of which had been read to him, and a third which he was told was “just the same as the other two.” The first two instruments were contracts which he *intended* to execute. The last instrument proved to be a promissory note which he had no intention of executing. His signature to the note was obtained by the fraudulent statement that it was just the same as the other papers, and by placing it before him in such a manner that he saw only the line on which he signed. An innocent purchaser acquired the note and brought suit upon it. The court held that Gibbs might disaffirm the instrument even as against this innocent holder. The fraud rendered the note no better than a forgery.

Gibbs v. Linabury, 22 Mich., 479.

Had Gibbs in the foregoing case, been guilty of negligence in failing to read the paper signed, he would have been denied the right of disaffirmance. It is a general rule that one who signs a document must acquaint himself with the contents. If he negligently fails so to do, he must suffer the consequences.

105. False Representations.—False representation of a material fact, made with knowledge of its falsity, or with the reckless abandon as to whether it be true or false, and which is intended to mislead and does mislead the opposite party to

his injury, is sufficient ground for the rescission of a contract.

ILLUSTRATION.—Durfus, et al, brought suit against Vollmar, et al, for the recovery of \$1,800 paid the latter for 200 acres of pine land purchased by Durfus and his associates under the following circumstances: after some preliminary correspondence, Durfus had been induced to go to look at the land. He was told by Vollmar's agent that there were 2,000,000 feet of pine there. In addition to this, under pretense of showing him the land under negotiation, Vollmar's agent took Durfus to a tract of heavy pine a mile distant from the parcel finally purchased, which the agent represented this to be. Durfus and his associates, in reliance upon the acts and statements of Vollmar's agent, concluded a purchase. Soon after, they discovered that they had been deceived; that the land sold them was not the land shown Durfus, and that the 200 acres conveyed to them did not contain 2,000,000 feet of pine. The court permitted Durfus and his associates to rescind the contract because of the misrepresentation, and to tender back the land, and to recover from Vollmar and his associates the purchase price.

McKinnon v. Vollmar, 75 Wis., 82.

106. Opinion.—An expression of opinion, where both parties are in an equal position to judge the truth or falsity of the expression, and where each party relies upon his own judgment, will not afford ground for the rescission of a contract. Thus, a statement that an article covered by patent is useful, or that a location is a good one for business, or that an unworked mine is rich, or that a well is inexhaustible, or that a certain amount of securities will have been sold by a certain date, or that land will produce a certain number of bushels of grain per acre, are all *matters of opinion*, and their falsity *will not* be sufficient reason to justify the rescission of a contract made in reliance thereupon. Thus, mere trade talk by one who extols the value of property which he has for sale, where both parties are equally able to judge, is not ground for rescission, although untrue.

ILLUSTRATIONS.—(I) A, as an inducement to B to purchase certain stock of a corporation, stated that he, A, believed that the stock would earn 20% dividends. The court held this to be a mere

expression of opinion which would not entitle B to rescind the contract if the stock did not pay 20%.

Robertson v. Parks, 76 Md., 118.

(II) A applied for a loan of money on certain land, stating that he would soon be able to find a purchaser for the property at a greatly advanced price. This was held to be a mere statement of opinion and not a false representation, even though the purchaser was not found.

Spense v. Geilfuss, 89 Wis., 499.

(III) Allison purchased a saw mill from Ward, et al. To induce the purchase, Ward represented that the surrounding country would supply enough work to keep the mill busy. This proved to be untrue. Allison attempted to rescind the transaction. The court held that the representation was a mere expression of opinion and, as such, even if false, did not afford a ground for rescission.

Allison v. Ward, 63 Mich., 128.

107. Expert Opinion.—When persons possessing special and unusual knowledge on a subject with respect to which their opinions are given, express a false opinion intended to mislead, such opinion will be treated by the courts as a false statement of fact.

ILLUSTRATIONS.—(I) A statement by an insurance solicitor that the dividends on the policy offered for sale will amount to a certain sum, and that the history and experience of the company show that such results have been and can be accomplished, amounts to a statement of fact which, if false, will be ground for rescission.

Beckwith v. Ryan, 66 Conn., 589.

(II) A statement by the owner that his stock of goods is worth a certain sum, accompanied by a refusal to take an inventory on the plea of lack of time, is a statement of fact, not opinion, and, if false, will sustain rescission of the sale.

Davis v. Jackson, 22 Ind., 233.

108. Mistake.—A contract arising through mistake of an essential fact by one or both of the parties thereto may generally be rescinded. The minds of the parties have not really met. Contracts cannot be rescinded on account of a mistake purely of law. Everyone is presumed to know the law.

109. Mutual Mistake.—When both parties to a contract are in error as to the subject matter of the contract, either may rescind.

ILLUSTRATION.—Insurance to the amount of \$5,000 covering a ship at sea was cancelled by mutual agreement of the assured and the insurance company. As a matter of fact, the ship had been wrecked in a storm some time before the date of the cancellation. Neither party knew this. When the loss was discovered, the policy holder rescinded the contract of cancellation and asked for payment of the \$5,000 due under the terms of the policy. The insurance company contended that the cancellation of the policy had closed the transaction. The court held that, as the cancellation agreement was made under a mistaken state of facts on the part of both parties, it was subject to rescission, and that rescission of the cancellation reinstated the policy.

Duncan v. New York Mutual Insurance Co., 138 N. Y., 88.

110. (e) Breach of Contract.—Violation of a binding agreement is a "breach of contract." The innocent injured party is entitled to reimbursement for the loss occasioned by such violation.

ILLUSTRATION.—A manufacturer agreed to supply a contractor with shoes which the latter intended to re-sell to the French government for the use of the French armies. The manufacturer guaranteed that no paper should be used in the soles. The shoes delivered were found, in part, to contain paper-filled soles, and for this reason were rejected by the French authorities. The court held that the contractor was entitled to reject all of the shoes and to recover from the manufacturer the profits that would have accrued had the shoes been accepted by the French government.

Heilbutt v. Hickson, L. R. 7 C. P., 455.

111. Breach of Implied Contract.—Damages may be recovered for breach of an *implied contract as well as for breach of an express contract.*

ILLUSTRATION.—There is an implied contract between a professional photographer and his customer, that the negative for which his customer sits shall be used for printing such portraits as the customer shall authorize, and none other. Rugg was a photographer. Moore was his customer. Without Moore's consent, Rugg made several photographs from a negative of Moore which had been taken in the regular

course of business. The court held that Rugg was liable to Moore for such damages as arose by reason of the breach of implied contract.

Moore v. Rugg, 44 Minn., 28.

112. Inducing Persons to Break a Contract.—In general, no action can be maintained for inducing a third person to break his contract. The remedy of the injured party consists in bringing suit against the opposite party for the breach.

ILLUSTRATION.—The owner of the Masonic Temple Theatre, Louisville, Ky., made a contract with Abbey, the manager of Mary Anderson, for the services of the latter and her company on a certain date. The owner of a rival theatre induced Abbey to break his contract. It was held that the owner of the Masonic Temple Theatre could not recover damages from the owner of the rival theatre but must rely for compensation upon an action against Abbey for the latter's breach of contract. . . .

Bourlier Bros. v. McCauley, 91 Ky., 135.

113. (f) Limitation.—A contract may come to an end by a limitation contained in the contract itself, or by limitation by law. Thus, if A were to lease a house from B for a term of three years, the lease contract would terminate by its own limitation at the end of that period and A would have no further right to occupy the property, except by B's consent.

So if A were to employ B for a period of one year, the contract would terminate by its own limitation at the end of the year of employment.

A contract may be terminated, so far as its enforceability is concerned, by limitation of law. This occurs when either party to the agreement refuses or neglects to recognize any liability upon it for a period of time fixed by law. The laws fixing such legal limits are called Statutes of Limitation. (For abstract of Statutes of Limitation of all States, see Appendix, Table D.)

CHAPTER XI.

DEFENSES AGAINST CONTRACTS.

114. Defenses.—When one is called upon to perform a contract, he may lawfully refuse compliance for any one or more of the following reasons, which we have already discussed, namely:

- Want of agreement,
- Want of proper form,
- Want of competent parties,
- Want of consideration,
- Want of certainty,
- Want of legal object.

Or he may refuse on the ground that the contract has been terminated by performance, impossibility of performance, substitution, mutual cancellation or rescission.

- There are still other defenses. Among them we shall note,
- (a) Merger,
 - (b) Alteration,
 - (c) Forgery,
 - (d) Bankruptcy,
 - (e) The Statute of Limitations.

115. (a) Merger.—Merger means the losing of the lesser in a greater. Thus, conversations, verbal agreements, and even written negotiations, leading up to a formal written contract are said to be merged in the final written agreement. So when there has been a verbal contract, and afterwards a written contract is made intended to cover the same subject, no suit can be had on the oral agreement. It is merged in the written contract.

ILLUSTRATION.—Granger agreed *verbally* with his tenant, Stuebben, to extend the latter's lease for a period of three years. Thereafter they entered into a *written* lease for a term of *one* year. Later, Stuebben brought suit to compel Granger to execute a lease running an additional two years, to make up the three year term that had been verbally agreed upon. The court held that the verbal agreement was lost by merger in the written, one-year lease.

Stuebben v. Granger, 63 Mich., 306.

116. (b) Alteration.—A person can be held only on the contract he has made. If the obligee changes it, even though the change may be to the obligor's advantage, the better rule is that the obligor is released—that the contract which he made has been destroyed by the alteration, and that the contract appearing in its stead is one that he never made. He may, however, be held liable to an innocent purchaser in cases where the alteration was made possible by the obligor's own negligence.

Alteration made by consent of all parties to the agreement is valid and does not impair the contract.

117. (c) Forgery.—Forgery includes both making and altering instruments falsely with intent to deceive. Any writing may be forged. The crime is not confined to any particular part of the document. All forged instruments are void.

118. (d) Discharge in Bankruptcy.—One who has been discharged in bankruptcy is released from all debts and contractual obligations embraced in the bankruptcy proceedings.

119. (e) The Statute of Limitations.—To avoid the annoyance and injustice arising through suits upon stale claims, all states provide statutes which limit the time during which suit may be brought upon obligations. When this time has expired the obligation is said to be "barred by limitation," or, in popular language, "outlawed." An action brought upon an outlawed claim may be defeated by proof that suit has not been commenced within the time provided by law. The period of limitation differs in the several states. (See Appendix, Table D.)

REVIEW QUESTIONS

1. What is a contract?
2. What does the law of contracts govern?
3. Give three reasons why a clear knowledge of contracts is of especial value to every one.
4. Give three classes of contracts, as to their legality.
5. Name two forms of express contracts, and state the chief advantage of the one form over the other.
6. Give six questions in passing upon the validity of a contract.
7. (a) When does an agreement occur?
(b) Distinguish between the terms agreement and contract.
8. Name and define the different kinds of offers.
9. What must be true of an acceptance to make it effectual?
10. Explain fully and clearly the difference between the terms Revocation and Rescission.
11. (a) When may an offer be cancelled?
(b) When may an acceptance be cancelled?
(c) When does the cancellation of an offer become effective if made by mail or telegraph?
(d) Tell the same of an acceptance revoked by mail or telegraph.
12. Name five classes of contracts, which, under the "Statute of Frauds" of most states, are required to be in writing.
13. (a) Name six points, which, while not always absolutely necessary, it is at least safest that memoranda of a contract should show.
(b) Illustrate how signing should be done by an agent.
14. (a) Name four classes of parties by whom contracts made are usually void or voidable.
(b) May an infant make a contract which will not be voidable, and, if so, under what conditions?
15. What is known as "Fraud of Infancy"?
16. How is drunkenness regarded by the law?
17. Define and give example of each of the following:
(a) Bad faith.
(b) Duress.
(c) Restraint of trade.
(d) Stifling competition.
(e) Usury.
(f) Legal rate.
(g) Maximum rate.
(h) Construction.
(i) Satisfaction.
(j) Parol.

18. (a) Name four things which will constitute "Good Consideration."

(b) Define and illustrate "Valuable Consideration."

19. Name two classes of void contracts.

20. Distinguish between technical and common words, and state how each is construed in law.

21. Show the difference between "Common Opinion" and "Expert Opinion."

22. What is a "Negative Contract," and by what means is it enforced?

23. Give six ways in which contracts may be terminated.

24. Give sixteen reasons, for any of which, one may refuse compliance with the terms.

25. Define and explain the purpose of Statute of Limitation.

PROBLEMS

1. A offered B a carload of apples delivered Nov. 1, at Des Moines, Iowa, @ \$3.00 a barrel. B accepted the offer as to price and place of delivery, and stated that he would take the apples Nov. 15. Was there an agreement? *No*

2. A, a salesman, for a school supply house, sold B, a dealer, a bill of supplies. On the invoice was printed the phrase, "Not subject to countermand". Before the order was accepted by the house, B telegraphed countermanding it. Could B be forced to accept the shipment? *No*

3. A agrees to support B during life. In return, B contracts to deed A a farm. B dies three months after the agreement. B's heirs claim that A is not entitled to the farm as there was no written agreement. Can A secure possession of the farm? *Yes*

4. A agrees to give his niece \$1000 when she graduates from the university. The agreement is made when the niece is in the high school. Is it binding if made orally? *No*

5. A says to B, "Let C have goods, and if he does not pay for them, I will." Is A liable? *No*

6. A says to B, "Let C have goods and charge them to my account." Is A liable? *Yes*

7. A says to B, "Will you marry me?" and B replies, "I will." Afterward, A marries C. Is A liable to B? *Yes*

8. A says to B, "If you will marry me I will give you \$5000." Can B compel A to pay the money? *No*

9. A signs a contract with B, agreeing to give B \$5000 to marry A. Can B compel A to pay the money? *Yes*

10. A agrees orally to buy land of B, and pays \$500 down. Can A compel B to deliver the land? *No*

11. A makes a contract in writing to buy land of B, and pays \$500 down. Can A compel B to deliver the land? *Yes*

12. A made a verbal contract with B to give B a course of lessons on the violin for \$100. Can B compel A to give the course? Can A compel B to pay the money? *Yes*

13. A contracts verbally with B to buy books to the value of \$500, and pays \$25 on the purchase price. Is the contract binding? *Yes*

14. A contracts verbally with B to buy books to the value of \$500, and B delivers a portion of the books, though there is no payment made. Is the contract binding? *Yes*

15. A offered B \$1000 for B's interest in a certain piece of Colorado land. B replied by letter saying, "I will accept your offer of \$1000 for my interest in the Colorado land." Can the contract be enforced? *No*

16. A, an infant, made a contract with B, agreeing to deliver to B 1000 bushels of corn on a certain date. A failed to deliver the corn. Can B collect damages? *No*

17. A made a contract with B, an infant, agreeing to deliver to B 1000 bushels of corn on a certain date. A failed to deliver the corn. Can B collect damages? *Yes*

18. A, an infant, contracts with B for board and lodging during the winter. Can B collect? *No*

19. A, an infant, sold a horse for \$200. On coming of age, he demanded back the horse. Could the purchaser recover the money? Could A recover the horse? *Yes*

20. Suppose in the above question that A had spent the \$200 for a motorcycle. Could he, on coming of age, demand the return of the horse? Could the purchaser claim the motorcycle? *No*

21. A, an infant, by representing himself to be past twenty-one years of age, bought a horse of B, giving his note for \$200. When the note fell due, A refused to pay, claiming infancy. Could B collect? *Yes*

22. A sold goods to B, B giving his note. Afterward B refused to pay, claiming that he was very drunk when he bought the goods. Can A collect? *No*

23. A, claiming to have been injured by being run over by B's automobile, and threatening to cause the arrest of B, induces B to give him a note for \$500. Can A enforce collection? *No*

24. A, a married woman, buys necessary groceries at the store. Can her husband be forced to pay for the groceries? *Yes*

25. A, a married woman in moderate circumstances, buys a \$2000 fur coat at the fur store. Can her husband be forced to pay for the coat? *No*

26. A, B, and C signed a written agreement to purchase a hotel,

each taking a one-third interest. Afterward A refused to carry out the agreement. Did B and C have any recourse? *Yes, out his part of the contract*

27. A made a written contract with B, agreeing to give B \$1000 on B's coming of age, if B would refrain from the use of alcoholic liquors until he was twenty-one. If B lived up to the agreement could he collect the money? *Yes*

28. In the above question could B collect if the contract had been that he become able to operate an aeroplane with skill before he was of age? *Yes*

29. Before going through bankruptcy A transferred a valuable residence to his wife, without receiving in return a valuable consideration. Could the creditors have the transfer set aside? If he had received in return for the residence a small money payment, could the transfer be set aside? *Yes*

30. A shows B an automobile, and says, "I will sell you this automobile for \$600." B says, "All right, I will take it at that price." Afterward A discovers that he has sold the wrong machine, his new instead of his old car. Is he bound to deliver the automobile? *Yes*

31. A, on his death bed, signs a contract with B agreeing to pay B \$10,000 if B will look after the education and setting up in business of A's children. Can B collect? *No*

32. A contracts illegally to deliver to B ten cases of beer. A delivers the beer. Can he collect? *No*

33. Some railroads require passengers riding on freight trains to sign contracts releasing the railroad from liability in case of injury or death. Are such contracts binding? *No*

34. A certain railroad has a contract with a manufacturer to transport his product at a price lower than the price charged competing concerns for the same product. Can the contract be enforced? *No*

35. A, a barber, sells his shop in Sioux City to B, agreeing not to go into the barber business again in Sioux City for five years. In two years A, in violation of the written contract, opens another shop in the same city. Is A liable to B? *Yes*

36. Suppose in the above question A had agreed not to enter business in Iowa or Nebraska. *No*

37. All the grocers in a certain city entered into a written agreement to sell certain staple articles at fixed prices. A violated the contract. Is he liable? *No*

38. A entered into a written contract with B to secure the support of a member of the legislature for a measure favorable to B, for a consideration of \$500. Is B liable? *No*

39. A makes a wager with B that he, A, can run 100 yards in ten seconds. A wins. Can he collect the amount of the wager? Explain fully. *No*

40. Are contracts for future delivery of grain or stock legal? *No*

41. A signs a written contract to secure a wife for B in consideration of \$500. Is the contract binding? *No*

42. A bought a watch of B, a jeweler. The watch was sold with a written guarantee to give satisfaction. Before A had paid for the watch he returned it stating that it was unsatisfactory. Could B collect? *No*

43. A teacher signed a contract not to teach elsewhere than in a certain college. Is the contract binding? *Yes*

44. A borrowed \$500 from B, agreeing to pay at A's convenience, the agreement being a promissory note. Could B collect? When? *Yes*

45. A sold B a piano on contract. The printed portion of the contract showed an absolute sale, but B had written in a clause making the contract conditional. Was the sale conditional or absolute? *conditional*

46. A sold an automobile to B, agreeing verbally to furnish free a fine kit of tools. The automobile was sold on written contract but no mention of the tools was made in the contract. Could B compel A to deliver the tools? *No*

47. A violinist has a contract to play at a music hall. He becomes ill and fails to perform. Is he liable for damages? *No*

48. A contracts to deliver certain goods to B. He afterwards discovers that he is out of the goods and can obtain no more. Is he liable? *Yes*

49. A had a written contract to do a certain piece of work for B. Afterward A and B agreed verbally to cancel the contract. Did the contract still hold? *No*

50. By deception A obtains B's signature to a note, B thinking he is signing an application for delivery. Is B liable to an innocent purchaser of the note? *No*

51. A contracts to sell B a certain section of land. He takes B to look at the land but shows him instead an adjoining and a better piece. Later B discovers the deception. Has he any recourse? *No*

52. A sells B stock in a corporation. He tells B he believes the stock will pay a dividend of 25%. The stock fails to pay any dividend. Is A liable? *No*

53. A sells B a stock of goods for a certain sum, stating that the goods are worth this sum. B afterward takes an inventory and finds that the value of the stock falls short of the purchase price several hundred dollars. Is A liable? *Yes*

54. A agrees to sell B a certain horse for \$200. Afterward it is discovered that at the time of the contract the horse had been dead for some time. Neither party knew this. Is A liable? *No*

55. A agrees to sell B, a tailor, cloth that is all wool. B finds that the cloth is 25 per cent cotton. Is A liable? *Yes*

56. A takes a portrait of a lady, and later, without her consent he uses the portrait for advertising purposes. Is he liable? *Yes*

57. A contracts to work for B. C induces A to cancel his contract with B and to work for him. Is C liable to B? *No*

58. A signs a note agreeing to pay B \$1000 without interest. No time is specified. When is the contract terminated? *(When the note is paid)*

59. A makes a verbal agreement to purchase 5000 bushels of potatoes of B. Later a contract is signed for delivery of 1000 bushels. *(The contract is enforceable)*

Can B force A to take more than 1000 bushels? *No*

Special Contracts.

PRINCIPAL AND AGENT,
PARTNERSHIP,
THE EMPLOYMENT OF LABOR,
CARRIERS,
SALES OF PERSONAL PROPERTY,
SALES OF REAL ESTATE,
LANDLORD AND TENANT.

CHAPTER XII.

PRINCIPAL AND AGENT.

120. The Relation.—An Agent is one who acts in the stead of another with authority so to do. The Principal is the one by whose authority the agent acts. Authority is the power delegated to the agent by his principal.

121. Kinds of Agents.—According to the scope of their authority, agents are classified as Special Agents and General Agents. A Special Agent is one whose authority is limited to a single transaction, or to transactions of a narrow and limited nature. Thus, an agent to sell and collect is a special agent. A General Agent is one who has power to transact all kinds of business relating to an enterprise.

122. General Agents.—A known general agent binds the principal by all transactions performed in relation to the business in which he is engaged and within the scope of his apparent authority.

ILLUSTRATION.—Widner was the general agent of Ayer for the purchase of timber used in railway construction. At Widner's request, English advanced money to meet the cost of sawing certain timber. In making the request, Widner was acting within what appeared to be his authority, although as a matter of fact his principal had not authorized him to borrow money. The court held that Ayer was bound to repay English the money borrowed by Widner, because, in procuring the loan, Widner was acting within the apparent scope of his authority as the general agent of Ayer.

English v. Ayer, 79 Mich., 516.

123. Special Agents.—A special agent binds his principal only when he acts within the scope of his *actual* authority. Persons who deal with a special agent must ascertain his authority at their own peril.

ILLUSTRATION.—Gibson, a traveling salesman for Jackson, Matthews & Harris, sold a bill of goods to Meadows amounting to \$224.39. Before the bill was due, Gibson called upon Meadows and offered a 2% discount for immediate payment. Meadows accepted the proposition and gave Gibson a check payable to the order of Jackson, Matthews & Harris, for the amount of the bill. Gibson indorsed the check as follows: "Jackson, Matthews & Harris by Gibson." The National Bank of the place paid the check to Gibson, who embezzled the amount and absconded. On learning what had happened, Jackson, Matthews & Harris sued the bank for the amount of the check. It was proved that, while Gibson had authority to collect, he had no authority to indorse the name of the firm upon checks collected. Inasmuch as Gibson was a *special agent*, the bank had relied upon his apparent authority *at its own peril*. Gibson's indorsement being manifestly a nullity, it followed that the bank had paid the check without right. The bank was therefore obliged to again pay the amount of the check—this time to the proper parties, Jackson Matthews & Harris.

Jackson, Matthews & Harris v. National Bank, 92 Tenn., 154.

124. Conferment of Authority.—Authority may be conferred upon the agent by words, or it may arise through acts, or even through a failure to act. When one knows that another is assuming to act as his agent, yet makes no objection, he can not deny the authority of the agent when such denial will injure those who have been misled by the supposed principal's silence. Thus, if A states to B in C's presence that he, A, is C's agent, B will be protected in relying upon such statement if C, hearing it, fails to contradict it.

Authority may be conferred verbally or in writing. Verbal authority is sufficient to authorize the agent to execute a written contract. But authority to execute a deed must be given in writing. Authority to execute an instrument required by law to be under seal must itself be under seal. Authority may be conferred by a power of attorney in the following form:—

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS, That I, John Doe, of Chicago, Cook County, Illinois, have made, constituted and appointed, and BY THESE PRESENTS do make, constitute and appoint Richard Roe, of Detroit, Wayne County, Michigan, my true and lawful ATTORNEY for me and in my name, place and stead, to sell at such price and terms as he shall see fit, and upon sale to make, execute and deliver to the purchaser a good and lawful conveyance, by warranty deed or otherwise, of the following land situate in the city of Detroit, Wayne County, Michigan, described as lot numbered eleven, in Cass Addition to said city of Detroit, as appears by the recorded plat of said addition, provided, that this power of attorney shall, unless sooner revoked, be in force for a period of thirty (30) days from and after this date, and no longer; hereby giving and granting unto Richard Roe, my said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power to substitution and revocation, hereby ratifying and confirming all that he, my said Attorney, or his substitute, shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 2d day of January, one thousand nine hundred six.

Signed, Sealed and Delivered

JOHN DOE (Seal.)

in Presence of

Thomas Campbell

Amos Graham.

State of Michigan, }
County of Wayne, } ss.

BE IT KNOWN, That on this 2d day of January one thousand nine hundred six, before me, a Notary Public in and for said County, personally appeared John Doe above named, who is to me known to be the person described in and who executed the above Letter of Attorney, and acknowledged the same to be his free act and deed.

WINTER WHITE,

Notary Public.

My commission expires March 6, 1906.

[SEAL]

125. Ratification.—Adoption of the act of another, either expressly or by receiving the benefits of such act, is called

Ratification. Thus, when a principal with full knowledge of the facts, accepts the proceeds of an unauthorized act of another who, without authority, or in excess of authority, has assumed to act for him, the principal is bound precisely as though the act had been performed with full authority and by his express request. Ratification is equivalent to prior command.

ILLUSTRATION.—Nichols, Shepard & Co. held a mortgage covering a ten horse power engine and other property belonging to Shaffer. Adams, the company's agent, went to take possession of the property under the mortgage. At Shaffer's request, and without authority, Adams released the engine and accepted a portable saw mill as security in its stead. This mill and the other mortgage property was sold under the mortgage and Nichols, Shepard & Co. received and kept the proceeds. Afterwards, they made claim to the ten horse power engine also, asserting that Adams had no authority to release it. But the court held that the unauthorized act of Adams in releasing the engine and accepting the saw-mill as security in its stead was ratified by Nichols, Shepard & Co. through the acceptance of the proceeds realized from the sale of the saw-mill.

Nichols, Shepard & Co. v. Shaffer, 63 Mich., 599.

126. Authority to Collect.—A general authority to collect is authority to receive *money*, and nothing else, in payment. One who pays an agent in something in which the agent has no authority to receive does not thereby discharge the debt, but may be compelled to pay it over again if the principal declines to ratify the agent's unauthorized settlement.

ILLUSTRATION.—Clark was a clerk in the office of J. & T. Hurley, dealers in coal. Without the knowledge of his employers, Clark arranged to pay his personal bills to Watson, a druggist, by delivering Watson coal. The transaction ran along over a period of seven years. J. and T. Hurley knew nothing of it. Watson made no inquiry. Both the Hurleys and Watson had implicit faith in Clark. Finally Clark absconded. In examining their books, his employers discovered that Watson had been furnished with coal to the amount of about \$500, for which they had not been paid. Clark had received rent and merchandise from Watson for nearly the whole of this amount. But Clark had no authority to turn the accounts of J. & T. Hurley in settlement of his private debts. He had authority to collect for them,

but authority to collect (unless expressly extended) is authority to receive money and nothing else. Clark had exceeded his authority. Therefore J. & T. Hurley, his principals, were not bound by his acts. They sued Watson and obliged him to pay them cash for the coal for which he had already paid Clark in rent and merchandise.

Hurley v. Watson, 68 Mich., 531.

127. Duty of Agent.—The highest duty of the agent is fidelity to his principal. An agent can not lawfully act adversely to his principal's interest. For example, he can not act as agent for both buyer and seller, except by consent of both parties. To this statement there is one apparent exception; one who acts as *a mere middle man*, simply bringing the parties together and leaving them to make their own bargain, may lawfully collect pay *from both* if both have agreed to pay. But if the agent's employment involves the exercise of discretion, he must act for one principal only.

ILLUSTRATION.—Dix, as agent for McNutt, reported a sale of certain land of the latter at \$450, but did not disclose the purchaser. McNutt executed a deed in blank and in this deed Dix inserted his own name as grantee. Dix afterwards sold the property for \$600. The court held that Dix must pay McNutt the \$150 profit thus gained.

McNutt v. Dix, 83 Mich., 328.

128. Liability of Agent.—An agent may exercise his power in such a manner as to bind himself. He does this,

- (a) When he acts for an undisclosed principal;
- (b) When he expressly pledges his own credit;
- (c) When he does an illegal act.

ILLUSTRATION.—A stock broker innocently received and sold a stolen stock certificate, the proceeds of which he delivered over to the thief. Though innocent, the broker's act was illegal. The owner of the certificate held the broker liable for the value of the stock.

Swim v. Wilson, 90 Calif., 126.

129. Signature of Agent.—The word "agent" after a signature is merely descriptive, and unless it appears from the body of the instrument that the agent intended to bind the principal and not himself, such a signature as "John Doe,

Agent" would in most cases be held to bind the agent only. By describing himself as agent, a person does not limit his liability any more than if he described himself as "Doctor," or "Student." To positively bind his principal and to clear himself of liability, the agent should sign in the following form:—

RICHARD ROE,
By JOHN DOE,
his Agent.

130. Termination of Agency.—An agency may be terminated by (a) limitation, (b) revocation, (c) insanity, (d) bankruptcy, or (e) death.

131. (a) Termination by Limitation.—When the agency is special and the special thing to be done has been done, the agency is at an end. When the agency is for a fixed time, and the time has expired, the agency is terminated.

132. (b) Termination by Revocation.—In general, the principal may always revoke the agent's authority at will. To this rule there is an important exception: an agency coupled with a pecuniary interest on the part of the agent in the subject of the agency can not be revoked without first extinguishing the interest.

ILLUSTRATION.—Baird employed Baker to collect a claim against the government. Baker was to be paid a contingency fee of 25% of all proceeds collected. After the work was partly performed, Baird employed another attorney. When final collection was made, Baker asked for his commission on the amount collected by the attorney last employed. Baird refused to pay, claiming that Baker's appointment had been revoked. Baird was unable to show that he extinguished Baker's interest in the subject matter of the agency, and the court held, therefore, that Baker's appointment *could not have been revoked*, and that Baker was entitled to recover from Baird the agreed commission upon all sums collected.

Baker v Baird, 79 Mich., 255.

133. (c) Termination by Insanity.—Insanity, when officially determined, terminates the agency.

134. (d) Termination by Bankruptcy.—The bankruptcy of the principal terminates all pre-existing agencies.

135. (e) Termination by Death.—The death of either the principal or the agent instantly terminates the agency.

ILLUSTRATION.—Lanaux placed papers in the hands of his clerk, instructing the latter to deliver the documents to certain persons who would call for them. Before the persons named called, Lanaux died. The court held that Lanaux's death ended the clerk's authority to deliver the papers to the persons named, and that the papers must be turned over to the executors of Lanaux's estate.

Succession of Lanaux, 46 La. Ann., 1036.

136. Disregard of Instructions.—When an agent disregards positive instructions, he will be personally liable to his principal for any ensuing loss. But if profit result, it belongs to the principal.

CHAPTER XIII.

PARTNERSHIP.

137. The Relation.—Any lawful business may be carried on by means of a partnership. A partnership exists when two or more persons combine their property, labor or skill in the transaction of business for mutual profit.

While the bearing of loss is a usual incident of partnerships, it is not essential to the partnership relation. The partners may agree among themselves that one or more of their number shall not participate in loss. But this agreement will not prevent such partners being liable to creditors for partnership debts.

138. Classes of Partners.—The real members of the firm are called actual partners. The apparent members of the firm are called ostensible partners. Persons who lend their names to the firm to strengthen its credit, or its popularity, are called Nominal partners. Persons who have a concealed interest in the firm are called Dormant or Silent partners.

All classes of partners are individually liable upon all of the debts and obligations of the firm. When a silent partner is discovered he may be held to the same extent as any other member.

139. Creation of Partnership.—Among the partners themselves, the relation must arise from expressed or implied contract. But third persons (i. e. "outsiders") may often hold an apparent partner to a partnership liability when no partnership was contracted for or intended.

ILLUSTRATION.—Dunn had a contract for a mile of railway grading. Connor let Dunn use his mules for this work, under an agreement that

Dunn and Connor *would share the profits equally*. They agreed between themselves that Connor should have nothing further to do with the work and that he should not be liable for the debts contracted in its performance. Nevertheless, because the relation formed fell within the definition of a partnership, Connor was held liable for payment of the debts contracted in the enterprise by Dunn.

Brandon & Dreyer v. Connor, 117 Ga., 759.

140. Kinds of Partnership.—As to their purpose partnerships are either trading or non-trading. If the business of the partnership is to buy and sell for profit, it is a trading partnership. If the business does not consist in buying and selling for profit, the partnership is non-trading. Thus, the business of farming and raising crops is non-trading; while the business of buying and selling produce is trading.

141. Trading Partnerships.—Each partner in a trading partnership is the general agent of all the other partners in the transaction of firm business. As among themselves, the partners may limit their authority by contract, but as to third parties having no knowledge of such limitation, the authority of each partner to bind every member of the firm is absolute. Each member of a trading partnership has power to borrow money, issue firm notes, mortgage the firm's assets, pledge the firm's credit, buy and sell property, and to do all other things incident to the partnership business, with or without the knowledge of the other partners.

ILLUSTRATION.—Robards & Swartz were partners in the grocery business. Without Robards' knowledge, Swartz gave a chattel mortgage to secure creditors upon indebtedness of the firm. The mortgage was held valid.

Robards v. Waterman, 96 Mich., 233.

142. Firm Bound, Through Funds Misappropriated.—*If a partner in a trading firm borrows money apparently for the firm, it is immaterial that he afterwards diverts the money so borrowed to his own private use. The firm will be bound by the obligation.*

ILLUSTRATION.—McLachlan & Linn formed a trading partnership under the name of D. A. McLachlan & Co. Linn signed the firm's name to notes which he negotiated, ostensibly for partnership purposes. These transactions were without knowledge to McLachlan. The money procured by the sale of the notes was never used for the firm, but was appropriated by Linn for his own private purposes. The notes were held to be a partnership obligation.

Stevens v. McLachlan, 120 Mich., 285.

143. Non-Trading Partnerships.—A member of a non-trading partnership can bind the firm only when he has express or implied authority so to do. Thus, if a member of a law firm, or of a firm of physicians, or of a firm engaged in the insurance business or in any other non-trading enterprise, were to offer for discount a note signed in the firm name, the person taking such note must ascertain at his own peril the partner's authority to execute it. If such authority does not exist, the partner, or partners participating in the transaction, or ratifying it, and no others, can be held liable upon the obligation.

ILLUSTRATION.—Golden & Lee formed a partnership to carry on a real estate, loan and insurance business on *commission*. They did not buy and sell on their own account, but merely accepted contracts and employment to act for others. Golden without Lee's consent made and negotiated a firm note to the amount of \$300. The proceeds of the note were not used for partnership purposes. It was held by the court that the firm was not bound by the transaction. The partnership being non-trading, Golden had no general authority to bind the firm's credit.

Lee v. First National Bank, 45 Kansas, 8.

144. Good Faith.—A partner can not act as the agent of his firm in making a contract with himself. Thus, a partner has no authority to loan himself the firm's money.

ILLUSTRATION.—A owed B \$1,000 on a private debt. A was a partner and also a cashier in a private bank. A notified B that he had placed \$1,000 to B's credit on the bank's books, and thereafter honored B's checks to that amount. As a matter of fact the credit was never entered on the books of the bank and the other partners had no knowledge of A's act. The court held that A had no right to loan

himself a \$1,000 with which to pay B, and that B's checks for that amount were mere overdrafts, and that B must return to the bank the \$1,000 so overdrawn.

Williams v. Dorrier, 135 Pa., 445.

145. Suits by Partners.—In general, a partner can not bring suit at law against his co-partners upon obligations arising in the course of the firm business. The reason for this is that one person can not be both plaintiff and defendant in the same suit. For one to sue a partnership of which he is a member would be, in effect, the bringing of a suit against himself.

If a partner has been unfairly dealt with, his only remedy is to go into a court of equity and ask for an accounting.

146. Sharing Profits and Losses.—In the absence of an agreement to the contrary, partners must, as among themselves, share the profits and bear the losses of the concern equally and without advantage to one partner over another. But they may agree upon any other basis of division, and, as among themselves, the agreement will be valid. It should be remembered, however, that no agreement among the partners will prevent creditors of the firm collecting all of the partnership's debts from any one of the partners. *All* are individually liable for *all* of the firm's obligations.

147. Compensation.—In the absence of an agreement to the contrary, partners are not entitled to compensation for services rendered for the firm. Each partner is entitled to his share of the profits, and to nothing more. Thus, if a partner falls sick, the other members of the firm must carry on the business without increased compensation, and must divide the profits precisely as though the services of the absent partner had been constantly devoted to the business.

So, if a partner dies, the other partners can not exact compensation for their services in closing up the firm's affairs.

ILLUSTRATIONS.—(I) Elijah W. Waters & Daniel H. Waters were co-partners in the manufacturing business. On account of illness, Elijah was absent from their place of business during some months

preceding the time of his death. During Elijah's absence, Daniel managed the business, doing all the work formerly performed by the two. By so doing he rendered extra services valued at \$3,100. This amount was paid him from Elijah's estate, but was afterwards recovered back by the estate on the ground that *Daniel was not entitled to compensation for extra services rendered in carrying on the partnership's business.*

Heath v. Waters, 40 Mich., 457.

(II) Raymond & Vaughan were partners in the sugar brokerage business in Chicago. Vaughan was adjudged insane by the county court and was committed to an asylum. Here he remained during several years and until his recovery. During this period Raymond carried on the business profitably. Upon regaining his health, Vaughan asked for an accounting, and that his share of the partnership profits be delivered over to him. This was granted by the court.

Raymond v. Vaughan, 128 Ill., 256.

148. Dissolution.—A partnership may be dissolved, (a) by mutual consent, (b) by withdrawal of one of the partners through sale of his interest in the concern, (c) by the bankruptcy of one of the partners, (d) by the death of a partner.

A dissolution may be decreed by a court, (a) when any partner becomes incapacitated by insanity, imprisonment, or other causes of more than a merely temporary nature, or (b) for fraud on the part of one or more members of the firm.

149. Notice of Dissolution.—When a firm has been dissolved, notice of the dissolution should be given to all persons with whom the firm has dealings, for, while the dissolution revokes the agency of each member to bind the personal credit of the others, this revocation does not operate against third parties who extend credit to the continuing partners without knowledge of the dissolution.

ILLUSTRATION.—Victoria Eckhardt withdrew from the firm of Hick Hemel & Eckhardt, May 18, 1889. On June 25, 1889, the firm executed two notes. These notes were made in the firm's name and were delivered to persons who had dealt with the firm, both before and after the retirement of Mrs. Eckhardt therefrom, and who had received no notice, and had no knowledge, of Mrs. Eckhardt's withdrawal. Mrs. Eckhardt was held and bound for the payment of the notes.

Sibley & Bearinger v. Parsons, 93 Mich., 538.

CHAPTER XIV.

THE EMPLOYMENT OF LABOR.

150. The Relation.—In law, the employer of labor is known as the Master; the employee is known as the Servant. The relation must result from express or implied contract. No compensation can be recovered for voluntary services rendered under circumstances which fail to show a mutual expectation that payment is to be made.

ILLUSTRATION.—Covel, a homeless man of advanced years, went to live with Turner, an old friend. It was understood that Covel might stay as long as he chose, and that he was expected to help about the premises while he remained. There was no evidence that Covel expected to charge, or that Turner expected to pay anything for these services. Afterwards Covel sued Turner for the value of the services rendered. The court held that Turner was under no obligation to pay because there was no contract, either express or implied, for payment.

Covel v. Turner, 74 Mich., 408.

151. Duty of Master.—It is the master's duty to, (a) provide the servant with reasonably safe premises and appliances, (b) to warn the servant of extraordinary dangers known to the master, (c) to use reasonable care in selecting safe fellow servants, (d) to pay the servant his wages.

152. Safe Premises.—Failure to provide reasonably safe premises renders the master liable to the servant for any resulting damages.

ILLUSTRATION.—Johnson was employed in a coal mine as a helper. Without his knowledge, a mass of partly loosened coal was permitted to remain overhanging a passage where his duties required him to

go. This over-hanging coal finally fell upon him, whereby he was injured. His master was held liable for the damages.

Treadwater Coal Co. v. Johnson (Ky.) 61 L. R. A., 161.

153. Safe Appliances.—The master is not bound to furnish his servant with the safest known appliances, but the appliance furnished must be reasonably safe. If they are otherwise, the master will be liable for resulting damages.

ILLUSTRATION.—Jennie Jacques was employed by the Great Falls Manufacturing Co. to operate a loom. A shuttle became loosened and the loom-fixer in charge was repeatedly called to repair it. He made whatever repairs he deemed necessary and the machinery was again set in motion. A short time afterwards, the shuttle flew out of the loom, struck Miss Jacques and put out one of her eyes. The evidence showed that, when the loom was in a reasonable condition of repair, the shuttle could not fly out. The court held the employer liable for the damages occasioned by the defective loom.

Jacques v. Great Falls Mfg. Co., 66 N. H., 482.

154. Warning of Extraordinary Danger.—Danger may be extraordinary by reason of the nature of the employment, or because of the youth or inexperience of the employee. In all such cases it is the master's duty to warn his servant. If he fails to do so, he will be liable for resulting injuries.

ILLUSTRATION.—(I) Edward Myhan, a young man, was employed as night oiler in the dynamo room of an electrical power plant. Certain uninsulated live wires were negligently permitted by the power company to run near the floor of this room. Myhan had no knowledge of the dangerous character of these wires, nor was he ever given any notice of the danger by any officer or employee of the company. Coming in contact with the wires, Myhan was instantly killed. The company was held liable.

Myhan v. Louisiana Electric Light & Power Co., 41 La. An., 964.

(II) Corrigan, a boy under the age of fourteen years, was sent by the foreman of a rolling mill to regulate the speed of rapidly revolving machinery in a place dangerous to one who was incompetent. The boy was not cautioned nor advised of the hazard incident to his post. He was caught in a belt and suffered a crushed limb. The employer was held liable.

Cleveland Rolling Mill Co. v. Corrigan, 46 O. St., 283.

155. Care in Selecting Servants.—The master must exercise reasonable care in furnishing his servants with competent fellow servants. If he fails to do this, he will be liable to his servants for injuries resulting from the negligently selected fellow servant's incompetence.

ILLUSTRATION.—Hoover was a railway engineer. A brakeman on Hoover's train was in the habit of becoming intoxicated. Owing to the brakeman's intoxication, Hoover's train was permitted to descend a steep grade without the brakes being properly set. A wreck being inevitable, Hoover leaped from the engine to save his life and was injured. The master was held liable because of his negligence in retaining the drunken brakeman. The master denied knowledge of the brakeman's intemperance, but the court held that, if this was true, the master was guilty of negligence *in not knowing* the brakeman's habits, as they might easily have been ascertained by investigation.

Norfolk & Western Ry. Co. v. Hoover, 79 Md., 253.

156. Assumed Risks.—A servant assumes the ordinary risks incident to the employment in which he engages. He can not recover from his master for damages arising from the ordinary dangers of the employment.

ILLUSTRATION.—Minty was the traveling auditor of the Utah & Northern Railroad. While, in the course of his duty, he was riding on a train passing over that road, the car in which he was sitting became derailed and he was injured. The cause of the accident was unknown, hence it was impossible to show negligence on the part of the master. The court held that the mere fact that Minty was injured while on duty through one of the risks naturally incident to the business, gave him no lawful claim for damages.

Minty v. Union Pacific R. R. Co., 2 Idaho, 437.

157. Negligence of Fellow Servants.—When a servant is injured through the negligence of a fellow servant engaged in the service of the same master and working to accomplish the same general object, the master will not be liable, unless he has been negligent in the selection or retention of the servant whose negligence caused the injury. The servant assumes the risk of negligence on the part of his fellow servants, provided the master has selected them with due care.

ILLUSTRATIONS.—Scofield was employed as a workman at a smelting furnace. There was a pit filled with scalding water on the premises. The pit was duly provided with coverings which the workmen were instructed to place over it when not in use. On the night of the accident, some of Scofield's fellow workmen left the pit uncovered. Scofield walked through the opening and was scalded to death. Suit was brought against the master, but, it being shown that the negligence was that of Scofield's fellow servants, the master was held exonerated.

Scofield v. Guggenheim Smelting Co., 64 N. J. L., 605.

158. Contributory Negligence.—When a servant's own fault contributes to his injury, the master can not be held liable.

But if the master instructs the servant to go into a place of danger, the master can not escape liability if the servant obeys and is injured, unless the risk was so glaring that a prudent man would have disobeyed the order.

ILLUSTRATION.—Ward was sent into a deep ditch by the express order of his master. He did not appreciate the danger, although the place was obviously dangerous. The ditch caved in and Ward was permanently injured. He brought suit against his master who attempted to escape liability on the theory that Ward was guilty of contributory negligence. Ward's master was held liable.

Norfolk & Western R. R. Co. v. Ward, 90 Va., 687.

159. Payment of Servant.—The final duty of the master is to pay the servant according to contract. If no amount has been agreed upon, the servant will be entitled to recover such an amount as his services are reasonably worth.

When a servant continues to serve after the termination of a definite contract, it will be presumed, in the absence of another agreement, that he continues at the same rate of compensation originally provided. When a servant, employed by the month or by the year, renders extra services in the general line of his employment, his regular salary will be presumed to cover such extra service, unless there has been a special agreement by the master to pay additional compensation.

If the master fails to pay his servant at the time and in the manner agreed upon, the failure amounts to a breach, for which the servant may declare the contract terminated.

160. Duty of Servant.—It is the duty of the servant to serve faithfully and with sobriety, and to obey all the reasonable commands of his master.

161. Discharge.—A servant may be lawfully discharged,

(a) For such immorality as diminishes the value of his services;

(b) For want of reasonable skill;

(c) For habitual neglect of duty;

(d) For prolonged sickness, but not for mere temporary illness;

(e) For insubordination.

162. Wrongful Discharge.—If the master discharges his servant without sufficient cause, the servant has his choice of two remedies:

(a) He may treat the contract as rescinded and sue for the reasonable value of the service rendered.

(b) He may treat the contract as still in force and recover damage for the breach of it. In this case if the master shows nothing in mitigation of damages, the servant is entitled to recover the whole amount specified in the original contract for the full term of the employment.

But the master in such case may show in mitigation of damages that the servant has obtained, or might have obtained by reasonable exertion, other employment in the same line of business and in the same locality. If this is shown, the amount of damages recoverable by the servant will be reduced by the amount which the servant has received, or might by proper exertion have received, during the period of the breach. Thus, if A as master, wrongfully discharged B, a servant, under a contract at \$200 per month having six months to run, B would be entitled to recover from A \$1200 less B's earnings, or possible earnings, in like employment in the same locality during the six months. If B obtained, or might have obtained, employment at \$100 per month during four months of the period, the \$400 earned would be deducted from the \$1200, leaving \$800 due B from A.

CHAPTER XV.

CARRIERS.

163. Classes of Carriers.—Carriers are of two kinds, private carriers and common carriers. A Private Carrier is one who undertakes to carry goods for particular customers only, and by special agreement. A Common Carrier is one who undertakes to carry for all persons who offer goods and the charges of carriage. Railroad companies, express companies, steamship companies, teamsters and truck-men are familiar examples of common carriers.

164. Liability of Private Carriers.—A private carrier is liable for damage or loss of goods intrusted to him for transportation, only when the damage or loss arose through his failure to use ordinary care.

165. Liability of Common Carriers.—When their liability is not qualified by contract or by statute, common carriers are responsible *for all loss or damage* during transportation arising *from any cause whatsoever*, except the act of God or the public enemy. This sweeping liability of the common carrier is usually expressly limited, and is often entirely extinguished by the contract between the carrier and the shipper.

166. Act of God.—Under no circumstances can a carrier be held liable for a loss or damage arising through an act of God. The expression "act of God" means such an irrepressible disaster as results immediately from natural causes and is not attributable to any human agency.

ILLUSTRATION.—A train proceeding over the Denver & Rio Grande Railroad was struck by a heavy wind which blew some of the cars from the track and caused their destruction. Suit was brought against the railroad company for the value of the goods destroyed in the wreck. The court held that the loss was attributable to an act of God and that, therefore, the carrier was without liability.

Blythe & Lehman v. Denver & Rio Grande R. Co., 15 Colo., 333.

167. Loss or Destruction of Goods.—If goods under transportation are lost or destroyed through means which the carrier might have prevented by the exercise of due care, the carrier will, in general, be held liable.

ILLUSTRATION.—The Johnstown flood so damaged the track of the Pennsylvania Railroad that a freight train on which ten barrels of whiskey were being transported, was delayed at Connemaugh. The train was not injured by the flood, but was abandoned by its crew. The whiskey was partly stolen by thieves and partly destroyed by citizens to prevent its falling in the hands of dangerous people. Because of the desertion of the train, the railroad company was held liable for the loss.

Lang v. Penna. R. Co., 154 Pa., 342.

168. Loss From Natural Causes.—A common carrier is not liable for loss caused by frost, fermentation, evaporation, or natural decay, or from the natural wear and tear in transportation, provided the carrier exercised reasonable diligence to render the loss as slight as possible.

ILLUSTRATION.—Wilson, a truckman, undertook to transport a barrel of molasses from a freight depot to a store. The day was excessively hot and, during the transportation, the contents of the barrel fermented, burst the barrel and was partially lost. Suit was brought against the truckman on the theory that, as a common carrier, he was liable for any injury occurring to the goods during transportation. Although the truckman had not limited his liability by contract, the court held that he was not liable for an injury to the goods resulting from an inherent quality of the goods themselves.

Fancher v. Wilson, 68 N. H., 388.

169. Limitation of Liability.—All courts agree that a carrier may make a valid stipulation with the shipper that the car-

rier shall not be held liable for loss or damage to the goods carried, arising without negligence on the part of the carrier. Some courts go even further and hold that a common carrier may contract for entire immunity from liability. This is particularly true when the carrier contracts for some special service out of the ordinary course of his business.

ILLUSTRATION.—A railroad company contracted to use its engine for drawing the special train of a circus over its line. The train was to run on a special schedule and a less rate was charged than was usual for transporting similar property. The contract provided that the railroad company should not be liable for loss arising *from any causes whatsoever*. During transportation, the circus train ran off the track at a misplaced switch. The train rolled down an embankment, and twenty-eight horses were either killed or injured. The owner of the circus brought suit against the railroad company, claiming that the contract exonerating the carrier from liability on account of the negligence was contrary to public policy and void. The court sustained the contract and held that the railroad company was thereby relieved of liability.

Chicago, M. & St. P. R. Co. v. Wallace, 66 Fed. Rep., 506.

170. Loss on Connecting Line.—A carrier may make a valid stipulation against liability for loss arising on the line of a connecting carrier.

ILLUSTRATION.—A railroad company received cattle for transportation from San Antonio to Chicago over its own and a connecting line. The shipping contract provided that the carrier should not be held for any damage to the cattle occurring after they had passed to the line of the connecting carrier. The cattle were damaged after passing to another road. The court held that the first carrier was not liable for the loss.

McCarn v. I. & G. N. R. Co., 84 Tex., 352.

171. Liability for its Own Negligence.—In the absence of special reasons, it is generally held contrary to public policy to permit a carrier to contract for immunity against liability arising from the negligence of itself, its agents and servants. Such contracts are quite generally held void.

172. Stipulation as to Value.—A stipulation that a carrier shall not be held liable for an amount exceeding the valua-

tion placed upon the goods by the shipper, in consideration of which the carrier undertakes to transport the goods at a less rate than would be asked if they had been appraised at a higher value, is valid.

ILLUSTRATION.—A shipper delivered to an express company a box of diamonds which he valued at \$50. The true value was \$579. The company charged a less rate for transportation than would have been exacted if the shipper had placed a true valuation upon the goods. The box of diamonds was lost and the shipper attempted to recover from the carrier their true value, but the court held that recovery was limited to \$50 by the shipper's own act.

Ballau v. Earle, 17 R. I., 441.

173. Rules.—Reasonable rules prescribed by common carriers and brought to the attention of shippers will be sustained by the courts.

ILLUSTRATION.—For the purpose of inducing prompt unloading of cars, a railroad company made a rule charging \$1 per day upon all cars not unloaded promptly. The rule was sustained by the court.

Miller & Co. v. Georgia R. & B. Co., 88 Ga., 563.

174. The Bill of Lading.—A bill of lading is both a receipt and a contract. It is a receipt for goods delivered to the carrier; it is a contract to safely carry the goods so received.

Bills of lading are evidence of property. A carrier who delivers goods to a consignee without production of the bill of lading, does so at his own risk. If the goods are delivered to one not entitled to receive them, the carrier will be held liable.

175. Draft With Bill of Lading.—When a shipper names himself or his agent as consignee and sends a bill of lading with a draft attached for collection as a condition precedent to delivery, title remains in the shipper, or his assigns, until the bill of lading passes into the hands of the consignee by payment of the draft.

ILLUSTRATION.—A vendor agreed upon the sale of certain mules, and received a small payment on the purchase price to bind the bargain. He shipped the mules consigned to his agents, sending his agents the bill of lading and draft, with instructions to deliver the mules on payment of the draft. The court held that the mules remained

the property of the shipper until the draft for the remainder of the purchase price was paid.

Bergeman v. I. & St. L. R. Co., 104 Mo., 77.

176. Discrimination in Rates.—A common carrier has no right to discriminate between members of the public. The carrier must serve all alike and for like compensation.

ILLUSTRATION.—The traffic rate for live stock from Newton, Ia., to Chicago was \$60 per car. Cook & Wheeler paid this rate upon 316 car loads of stock. They then discovered that the railroad company was making a secret rebate from \$3 to \$20 per car to other shippers. By computation it was found that Cook & Wheeler had paid \$2,733.98 more than their competitors upon a like number of cars shipped from the same point. The court permitted Cook & Wheeler to recover back this excess charge from the railroad company.

Cook & Wheeler v. Chicago R. I. & P. R. Co., 81 Ia., 551.

177. Stoppage in Transitu.—When a shipper, while goods are in the hands of the carrier, discovers that the consignee is insolvent, he may stop delivery of the goods by giving the carrier notice not to deliver them. This is known as "stoppage in transitu." The carrier may lawfully require indemnity from the shipper before making the stoppage effective.

The right of stoppage in transitu is based upon the plain principle that one man's goods should not be used to pay another man's debts. The right can be exercised only in cases where the vendee's insolvency was unknown to the vendor at the time of sale, or when it occurred after the sale. It must be exercised, if at all, before delivery of the goods has been made to the vendee. After delivery, it is too late.

If the vendor knew that the vendee was insolvent at the time of sale, and chose to take the risk, he cannot afterwards exercise stoppage in transitu.

ILLUSTRATION.—A firm sold goods to Twist, knowing him to be insolvent. The goods were shipped by rail and were attached before arriving at their destination. The vendors claimed the goods under alleged right of stoppage in transitu. Held, they did not have the right, because of their knowledge of Twist's condition at the time of sale.

Fenkhausen v. Fellows, 20 Nevada, 312.

CHAPTER XVI.

SALES OF PERSONAL PROPERTY.

178. Sale.—Sale is a contract by which one, called a “vendor,” transfers property to another, called a “vendee,” for a consideration called “purchase price” paid or to be paid.

When the purchase price is payable in property, the transaction is barter or exchange.

179. Title.—One who purchases property takes it subject to all defects in the title of his vendor. As to all property, except negotiable instruments, the maxim *caveat emptor* (let the purchaser beware) applies. In general, if the vendee has bought property which his vendor did not own and had no right to sell, the true owner, or the person entitled to possession, may retake it.

180. Bill of Sale.—When a sale is made of chattels so situated that physical delivery is impracticable, it is often necessary and always safe to have the vendor execute and deliver a written bill of sale to the vendee. This instrument may be in the following form:—

BILL OF SALE.

This Bill of Sale, made this second day of January, 1906, between Richard Roe, of Detroit, Michigan, as vendor, and John Doe, of Chicago, Illinois, as vendee,

WITNESSETH, that the said vendor, in consideration of One Hundred Dollars, to him paid by said vendee, receipt whereof is hereby confessed and acknowledged, has bargained and sold, and does hereby assign and transfer unto said vendee, the following described property, to wit:—

One bay horse, called “Tom,” specially marked by star in forehead, and a white left hind foot.

One single, top buggy, made by Studebaker Bros., hereby warranting that said vendor at the time of execution and delivery hereof is the sole owner of the property herein sold and transferred, and that the same is free from all liens and incumbrances.

RICHARD ROE (L. S.)

181. Requisites of Sale.—Three things are necessary to constitute a valid sale:—

(a) The thing to be sold, which must be in existence;

(b) A determinable or a determined price;

(c) An intent to pass title from the vendor to the vendee.

If the thing sold is not in existence at the time of the sale, the sale will be invalid. Thus, if one man sells to another a horse, and the horse is dead, or if he sells a cargo, and the ship has sunk, or if he sells a house and it has been burned, both parties being ignorant of the fact before sale, the transaction is void.

But if only part of the property has been destroyed, the vendee may elect to rescind or affirm the contract as to the remainder.

182. Change of Ownership.—In every sale there is a moment when the property sold ceases to belong to the vendor and becomes vested in the vendee. Until this occurs, the sale is incomplete, and the property, if lost or destroyed, is the loss of the vendor. Clearly, if the property is lost or destroyed after the sale is complete, the loss must fall upon the vendee.

In determining whether or not title has passed, *the intent of the parties controls*. This intent is determined by examining the words and acts of the parties in the light of the surrounding circumstances. There are no positive and inflexible rules by which the intent may be invariably ascertained. The courts are guided, however, by the principles set forth in the six sections next following.

183. (a) Sales for Cash.—When a sale is for cash, title passes upon payment being made, *and not before*.

ILLUSTRATION.—Price bought 50 tubs of butterine in Kansas City for shipment to Ft. Scott. The agreement was that cash was to be paid for the goods upon their arrival at destination. The invoices were marked, "Terms cash."

The butterine was not paid for on arrival, but was, instead, seized by Price's creditors. The vendors brought replevin, claiming that title had not passed to Price, but was still in them. The court sustained the vendors' contention and restored them their goods.

Daugherty v. Fowler, 44 Kansas, 628.

All sales are for cash, unless credit has been agreed upon, either expressly or by an established course of dealing. Had the invoice in the above case been made "Terms, cash in 10 days," title would have passed to Price with delivery, and the vendors could not have recovered the property.

184. (b) Sales on Credit.—When terms of credit have been arranged and the property sold has been set aside or designated, so that nothing remains to be done by the vendor before making delivery, title will pass at once to the vendee, unless the parties have agreed otherwise.

ILLUSTRATION.—A quantity of lumber had been selected, measured and piled up on a wharf to be loaded on boats for the vendee. Before the arrival of the transports, the lumber was burned. The sale having been made upon credit, it was held that the title had vested in the vendee and that the loss was his. He was, therefore, required to pay the vendor for the lumber, precisely as though it had not been destroyed.

Whitcomb v. Whitney, 24 Mich., 485.

185. (c) Condition Unperformed by Vendor.—When something remains to be done by the vendor to ascertain the identity (as by selecting), the quantity (as by measuring), or the quality (as by testing) of the thing sold, or if the thing sold is to be put into a certain condition before delivery, these, or any of these facts go to prove that title has not passed to the vendee.

ILLUSTRATION.—A contract was made for the sale of certain millet, then standing, with the provision that the millet was to be cut and stacked. Held, that no title passed to the vendee before the condition of cutting and stacking had been performed.

Hughes v. Wiley, 36 Kansas, 731.

186. (d) Delivery to Vendee.—When goods are sold on credit without reservation of title by the vendor, delivery of

the goods to the vendee is evidence that title has passed to him.

Delivery of goods to a common carrier designated by the vendee (or to any common carrier if he has not designated one), for unrestricted shipment to the vendee, is *delivery to the vendee*. The common carrier is the agent of the vendee. Such delivery is subject to the right of *stoppage in transitu*, in case the vendee is found to be insolvent before the arrival and delivery to him of actual possession of the goods.

But delivery to the carrier of goods shipped C. O. D. is not delivery to the vendee, and in that case neither possession nor title will pass to the vendee until payment has been made.

187. (e) Consigned Goods.—When goods are “consigned,” to be paid for when sold, *no title passes to the consignee*. If the goods “consigned” are destroyed, the loss, must fall upon the consignor, unless the parties have otherwise contracted. The consigned goods cannot be lawfully levied upon by the creditors of the consignee.

The laws of the several states are not uniform concerning consigned property. Some states require the consignor to give publicity, in some manner, to the fact that the goods are consigned and not sold. Failing of this, in such states, the consignor is subject to the loss of important rights. When consignments are extensive, they should be made only pursuant to carefully drawn contracts. The relation between consignor and consignee is that of *principal and agent*. It is governed by the law of agency.

ILLUSTRATION.—The case of *National Bank v. Goodyear*, 90 Ga., 711, gives a fair outline of the items commonly embraced in a consignment contract. In that case the contract contained stipulations that (a) the consignee should receive goods to be sold by him as agent of the consignor; (b) that the consignee was to make monthly reports of the sales effected and of the goods unsold remaining on hand; (c) title to all unsold goods and to the proceeds of all sales was to be and remain in the consignor; (d) remittances for goods sold were to be made promptly at the time of sale; (e) The consignee was to pay all freight, storage and other charges, and to keep the goods insured for the benefit of the consignor, all at the consignee's expense; (f)

the consignee was to have as his sole compensation, whatever the goods sold for above the invoice price; (g) the consignor reserved the right to terminate the agency, and to retake the consigned goods.

The court held that, under this arrangement, title remained in the consignor.

188. (f) Express Reservation of Title by Vendor.—

Title does not pass to the vendee until full payment is made, if such is the express provision of the sale. This is a valid provision as between vendor and vendee in all states. A few hold that such an arrangement is void as to creditors and as to third persons who take the property from the vendee without notice of his want of title.

When a vendor desires to retain title, it is a common practise to require the vendee to execute a title note, which may properly be in the following form:—

DETROIT, MICH., January 2, 1906.

\$30.00

On or before one year after date, I promise to pay to the order of John Doe, the sum of Thirty Dollars, value received, with interest at six per cent. per annum, payable semi-annually, at Home Savings Bank, Detroit, Mich.

This note is given for the purchase price of the following described personal property, to-wit: One set of sixteen volumes of Whytes Briefs, bound in buckram, this day agreed to be sold by said John Doe, the payee of this note, to Richard Roe, the maker of this note, it being expressly agreed by both of said parties, that the title, ownership, and right of possession in and to said above described property shall be retained by and remain in said John Doe until the whole amount of this note, including interest, shall be paid in full, this being the only memorandum of such agreement.

(Signed) RICHARD ROE.

189. Inspection of Goods.—The vendee should promptly inspect goods delivered to him. If the goods were sold to him as being of a certain kind and quality, he may lawfully reject them if they prove to be of an inferior kind or quality. But to exercise this right, he must act promptly. Unreasonable delay in making inspection *will be construed as acceptance.*

Reception of goods after inspection, or after fair opportunity to inspect, waives all objections as to the kind and quality.

ILLUSTRATION.—Dealers purchased wheat which the vendor agreed should grade No. 2. The vendees inspected the grain and reshipped it to another destination. On arrival there, it fell below the grade agreed upon. The court held that the vendees had accepted the grain, and that they had thereby waived all objection to its quality.

Jones v. McEwan, 91 Ky., 373.

190. Latent Defects.—Latent defects, not discoverable by usual and reasonable methods of inspection *are not waived by acceptance after such inspection.*

ILLUSTRATION.—Miller & Co. bought of Moore, Sims & Co., a quantity of No. 2 white mixed corn. Three cars were delivered, inspected and accepted. The inspection was made by digging into the corn a foot or more as it lay in bulk in the cars. When vendees transferred the corn from the cars to their elevators, they found it "false packed," and that, beginning some two feet below the surface, it was musty and "blue-eyed." Although the false packing was not the work of the vendors, and although they had no knowledge of it, they were held liable to Miller & Co. for the amount of the latter's damages.

Miller v. Moore, 83 Ga., 684.

191. Quality of Goods.—When goods are purchased in vague and general terms, there is an implied warranty that the goods shall be of *merchantable quality.*

ILLUSTRATION.—Merchants purchased a quantity of ice. It proved unmerchantable. The court held that the vendor had broken an implied warranty, which was, that the ice should be *merchantable.*

Murchie v. Cornell, 155 Mass., 60.

192. Purchase by Particular Description.—When property is purchased by a particular description, there is an implied warranty that the property is of that description. If it proves otherwise, the warranty *is broken*, and the vendor is liable for the vendee's damages. The vendee may rescind the contract and refuse the property.

ILLUSTRATION.—Certain cattle were sold for future delivery under the description of "fat cattle." Held, that the cattle must be of the description at the time of delivery or the purchase could be rescinded.

Foss v. Sabin, 84 Ill., 564.

193. Warranty of Fitness.—When a manufacturer or a dealer contracts to supply an article to be applied to a particular use, and the buyer trusts and *relies upon the sellers judgment, and not upon his own*, there is an implied warranty that the article shall be reasonably fit for the use specified. But when an article of a well defined kind is ordered from a manufacturer, even though the order sets forth the purpose for which the article is to be used, there is no implied warranty that the article will be adapted to that purpose. The only implied warranty is that the article shall conform to the general description of articles of its kind, and that it shall be of good materials and workmanship.

ILLUSTRATION.—A person ordered an auger of a certain size to be used in boring wells. An auger of the proper size and description was sent, but, upon trial, it was found not adapted to the purpose for which its purchaser intended it. Held, that the purchaser had no remedy.

Goulds v. Brophy, 42 Minn., 109.

194. Warranty of Food.—One who sells material for use as food, impliedly warrants that it is fit for the purpose. If it proves unfit, the vendee may rescind the sale upon discovery of the fact, and may recover damages.

If a dealer sells food which he knows, or by proper care on his part could have known, to be dangerous to the life or health of those who, without fault, eat it, he will be liable for the consequences.

ILLUSTRATION.—A caterer supplied a supper given at a ball. Certain of the food was poisonous and guests were injured thereby. The caterer was held liable.

Bishop v. Weber, 139 Mass., 410.

A vendor of hay, knowing that some white lead paint had become mixed with the same, was held liable for the value of a cow that died by reason of having eaten the poisoned hay.

French v. Vining, 102 Mass., 132.

195. Warranty in Sales by Sample.—When goods are sold by sample there is an implied warranty that the goods delivered shall equal the sample in quality. But there is no

warranty that they shall be better than the sample. When there are defects in the sample, equally visible to both parties, the vendee can not complain if the goods delivered contain the same defect.

ILLUSTRATION.—A lithographing firm took an order for cards, conditioned upon approval of a proof. The proof was submitted to the purchaser, who marked it "O. K." The work was finished and delivered. The purchasers refused to pay for it on the ground that two words were transposed, making the work different from the copy. The work was, however, *identical with the approved sample*, which also contained the same defect. The purchasers were forced to make payment for the cards.

Gills, etc., Printing Co. v. Chase, 149 Mass., 459.

196. Fraud in Sales.—When one purchases goods with the pre-existing intent not to pay for them, the seller may disaffirm the contract and recover back his goods, unless the rights of an innocent person have intervened.

The mere fact that the vendee knew himself to be insolvent at the time of purchase is not fraud, provided he bought with intent to pay.

Sales made in fraud of creditors, where both vendor and vendee participate in the fraud are void.

Sales made in fraud of creditors, where the vendee is an innocent purchaser for value, are valid.

Sales, like other contracts may be vitiated by fraud. A fraud sufficient to avoid any other contract will avoid a sale. (See Sec. 104.)

196 a. Bulk Sales of Stocks of Merchandise.—In many of the states there are special statutes regulating sales in bulk (i. e., sales as a whole and not in usual course of trade) of stocks of merchandise. These statutes are for the protection of the creditors of the selling concern, and generally require the purchaser to give such creditors due notice of the impending sale before its consummation. Failure to give the required notice renders the purchaser liable.

CHAPTER XVII.

SALES OF REAL ESTATE.

197. Sales of Real Estate.—Contracts for the sale of real estate, to be valid, must be in writing. Part payment of purchase price will not bind a bargain for the sale of land.

Contracts for the sale of land are of two classes: (a) Land Options and (b) Land Contracts.

198. Land Options.—A Land Option is a written instrument, made for a valuable consideration, granting a person the right to purchase if he chooses (but not binding him to purchase) certain real estate on certain terms, and within a time specified. When a person has reason to think that he may, at some unremote future time, desire to buy certain real estate, the usual practise is for him to obtain, if possible, an option upon it, running a sufficient length of time to enable him to fully decide whether he will or will not make the purchase. Land options are frequently used when it is desired to buy real estate without disclosing the name of the purchaser until after the price has been fixed. Owners often ask excessive prices if it is known that the prospective purchaser is a wealthy person, firm or corporation. To forestall this tendency, it is a common practise to commission a third person to obtain an assignable option in his own name, fixing the price at a fair amount. This option is then assigned to the real purchaser, who can then tender the price stated in the option and require conveyance of the property to himself.

The option contract must be upon a sufficient consideration. *A gratuitous option is void.* The option may provide that the sum paid for it shall apply upon purchase price in the

event of purchase. Payment of one dollar will be a sufficient consideration to make the contract binding upon the prospective vendor, no matter how great the value of the land involved. Land owners usually charge for options a fair compensation for the advantage conferred. Under a land option, the vendor is bound to sell if the vendee elects to buy; but the vendee is under no obligation to make the purchase.

199. Form of Option.—When an option is valuable, it should be executed with the same formalities required for the execution of deeds. It may then be recorded in the office where the public land records are kept in the county where the optioned land is situate. By recording the option, the owner of the land is prevented from selling the property while the option is in force, except subject to the option.

The following is a form of option widely used:—

THIS CONTRACT, Made this second day of January, A. D. 1906, by and between John Doe and Mary Doe, his wife, both of Chicago, Cook County, Illinois, as parties of the first part, and Richard Roe, of Detroit, Wayne County, Michigan, as party of the second part.

WITNESSETH, that the said parties of the first part, in consideration of the sum of one dollar to them in hand paid by said party of the second part, do hereby agree that they shall and will at any time within six months from the date hereof, at the written request of the said party of the second part, execute and deliver to him, or to his heirs, executors, administrators or assigns, a good and sufficient Warranty Deed of the following described land, situated in the city of Cincinnati, county of Hamilton, state of Ohio, to-wit:

Lot numbered one (1) in Cosgrove's Addition to said City of Cincinnati, as the same appears by the recorded plat thereof, for the sum of One Thousand (\$1,000) Dollars, payable in cash at the time of delivery of said deed.

And the said parties of the first part do hereby further agree that they will not within six months from the date hereof, sell, convey, mortgage, or otherwise incumber the said land, or any part thereof, or do, or permit to be done, any act to impair or incumber the title to said land.

It is further agreed that, if said party of the second part shall not have exercised this option within six months from and after this date, he shall have no further rights hereunder, and that the option

herein granted shall, at the expiration of said period of six months, absolutely cease and terminate.

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals the day and year first above written.

JOHN DOE (SEAL)
MARY DOE (SEA)

In presence of
THOMAS MASON
HOWARD RICE

(If the instrument is to be recorded, it should be acknowledged before a Notary Public, or other proper officer.)

The option should be signed by all persons who are expected to sign the deed to be given in case of purchase. Thus, if the wife of the vendor is a necessary party to the anticipated deed, she should sign the option contract.

When the vendor named in a valid option refuses to make and deliver the promised deed upon tender of full payment within the appointed time, the courts will enforce performance of the contract, or will award the vendee damages for its breach, as the vendee elects.

200. Land Contracts.—A Land Contract is a written agreement in which the vendor undertakes to sell and convey, and the vendee undertakes to buy, make payment for, and receive conveyance of, certain land on specified terms. These terms may embrace any lawful arrangement which the parties choose to make. The mutual promises contained in such a contract are a sufficient consideration to sustain it without payment of money by the vendee.

201. Form of Land Contract.—The following is a simple form of Land Contract:—

THIS CONTRACT, Made this second day of January, 1906, between John Doe and Mary Doe, his wife, of Chicago, Cook County, Illinois, as parties of the first part, and Richard Roe, of Detroit, Wayne County, Michigan, as party of the second part.

WITNESSETH, That the said parties of the first part, in consideration of the sum of one thousand dollars (\$1,000), to be to them duly paid as hereinafter specified, hereby agree to sell and convey to

the said party of the second part, all the following described land, situated in the city of Detroit, County of Wayne, State of Michigan, to-wit:

Lots numbered nine (9) and ten (10) in Cass Addition to said city of Detroit, as the same appears by the recorded plat thereof, for the said sum of one thousand dollars (\$1,000), which the said party of the second part hereby agrees to pay to the said parties of the first part, as follows:—

Five hundred dollars (\$500) together with interest on all sums unpaid computed at the rate of six (6) per centum per annum, shall be paid on or before one year after the date hereof; Five hundred dollars (\$500) together with interest on all sums then payable shall be paid on or before two years after the date hereof.

Said party of the second part also agrees to pay promptly as soon as due, all taxes and assessments, extraordinary as well as ordinary, that shall be taxed or assessed on said land, during the term of this contract, or any extensions hereof.

It is agreed by the parties hereto, that the said parties of the first part, on receiving payment in full of the said principal and interest at the times and in the manner above mentioned, and of all other sums chargeable in their favor hereon, shall and will, at their own proper cost and expense, execute and deliver to the said party of the second part, a good and sufficient Warranty Deed of said above described land, free and clear of and from all liens and incumbrances, except such as may have accrued on said land subsequent to the date hereof, by or through the acts or negligence of said party of the second part.

It is also agreed by the parties hereto, that said party of the second part shall have possession of said land, under this Contract, on the date hereof.

It is also agreed by the parties hereto, that if the said party of the second part shall fail to perform this Contract, or any part of the same, the said parties of the first part, shall immediately after such failure, have the right to declare this contract void, and to retain whatever may have been paid hereon, and all improvements that may have been made on said land, as stipulated damages for non-performance of this Contract, and may consider and treat said party of the second part as a tenant holding over without permission, and may take immediate possession of said land, and remove said party of the second part therefrom, and said party of the second part hereby waives any and all notice to quit in the event of his default in any manner hereupon.

And it is agreed, that the stipulations herein contained are to apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto.

IN WITNESS WHEREOF, The parties hereto have hereunto set their hands and seals, the day and year first above written. (Executed in duplicate.)

In Presence of
NELSON WHITCOMB
HARRISON TYLER.

JOHN DOE	[SEAL]
MARY DOE	[SEAL]
RICHARD ROE	[SEAL]

202. Parties to Land Contract.—As in the case of an option, all persons necessary to make such final conveyance as is desired should be joined in the contract as parties of the first part. The parties of the second part should include all from whom payment is expected.

203. Recording.—It is always the safer course for the vendee to have his contract acknowledged and recorded. When the contract is recorded it is notice to all the world of the rights of the parties thereto. Thus, A contracted with B to sell B certain land. B recorded the contract. A afterwards and while B's contract was in force, sold and conveyed the same land to C. C's title was subject to B's rights. But if C had bought innocently and without notice of B's contract, C would have taken the property clear of any claim on the part of B, and B would have had no recourse, except an action against A for breach of contract.

The fact that a contract vendee is openly and visibly in possession of the property contracted for, is notice to all the world of his claim whether his contract is or is not recorded. Even if the contract vendee is not in possession of the property, and has not recorded his contract, a third person who acquires an interest in the contract property by mortgage, deed or otherwise, with *actual* notice of the vendee's contract, holds subject to the contract vendee's rights.

204. Forfeiture.—The law does not favor forfeitures. Land contracts usually provide that payments shall be made on certain dates, and that, if payment is not so made, the contract and all payments made thereupon, and all improvements made

on the land shall be forfeited. Yet, if payment is not made promptly, the contract is not *ipso facto* terminated. Unless he is grossly in default, the vendee may still tender the purchase price and interest, and compel conveyance, unless the vendor has, *by some affirmative act*, brought the contract to an end.

Upon default by the vendee, the vendor may terminate the contract by re-entering and taking possession of the land, or by some act equivalent thereto.

If the vendor desires to terminate the contract because payment is not made promptly, he should act without such delay as will indicate a contrary intention. For if the parties do not treat time as an essential element of the contract, the courts will not.

ILLUSTRATION.—Robinson purchased 30 acres of land from Trufant for \$1,800 upon a contract, all of which was to have been paid by July 1, 1889. Robinson made payments from time to time, but not as provided in the contract. These payments were accepted by Trufant. The last payment was made and accepted September 6, 1890. On December 31, 1890, Trufant commenced proceedings to recover possession of the land. Robinson then tendered the amount due (which, with interest, exceeded the original purchase price) and the court decreed that Trufant, notwithstanding Robinson's delay in payment, must deed over to Robinson the property called for by the contract.

Robinson v. Trufant, 97 Mich., 410.

205. Deeds.—When the real estate has been sold, the vendee is given title by means of a written instrument called a Deed. The person making the deed is a Grantor. The person to whom the property is transferred is a Grantee. The deed should identify these parties by name and place of residence, and should particularly and accurately describe the land conveyed. If there is any doubt about the correctness of the description, a surveyor should be employed for the purpose of making a perfect description of the lands by means of fixed landmarks and actual measurements.

206. A Certain Quantity "More or Less."—When a tract of land is described as containing a certain quantity "more or less," neither party can complain of a surplus or shortage,

provided there has been no misrepresentation or fraud and provided the discrepancy is not so great as to indicate that a serious and essential mistake has been committed.

ILLUSTRATION.—Trenkle deeded Jackson “2,376 acres of land, be the same more or less.” The tract was afterwards found to contain only 1,936 acres. The lands had been sold at a lump price, and not at a certain price per acre. There had been no misrepresentation and no fraud. It was held that the purchaser had no remedy.

Trenkle v. Jackson, 86 Va., 238.

207. Examination of Title.—The grantee should in all cases assure himself of the sufficiency of the grantor’s title, remembering that the grantor cannot convey more or better title than he owns. Various aids in the examination of titles are provided in different parts of the Union. Thus, abstracts showing a brief history of the transfers of the property are in quite general use. But these abstracts are entitled to confidence only so far as they are known to have been prepared by competent persons. In important transactions (if not in all) the original records should be searched. This service is usually best performed by lawyers, and, preferably, by those who have a special aptitude and experience in this class of work.

208. Warranty Deeds.—Deeds are of two principal kinds, —Warranty Deeds and Quit Claim Deeds. The warranty deed is so called because of certain covenants which it commonly contains. These covenants, made by the grantor, are usually,

(a) That the grantor owns the conveyed premises in fee simple;

(b) That he has good right to convey the same;

(c) That the premises are free from incumbrances;

(d) That the grantee shall not be disturbed in his quiet possession of the premises by reason of any existing defect in the title; and

(e) That the grantor will warrant and defend the grantee against eviction by anyone who may prove a paramount title.

The covenants for quiet enjoyment and to warrant and defend against paramount title are not broken except by actual

eviction of the grantee, his heirs or assigns. These two covenants pass with the land and may be enforced by the heirs or assigns of the grantee. The other three covenants (a, b and c) if broken at all are broken at the moment when the deed is executed and are enforceable by the grantee only.

If the covenant against incumbrances is broken, the grantee is entitled to recover from the grantor the amount necessarily paid to discharge the incumbrances.

If the other covenants are broken (a, b, d and e) the grantee is entitled to recover from the grantor the price paid for the lands, plus interest. The following form of warranty deed is in general use:—

WARRANTY DEED

THIS INDENTURE, Made this first day of March, A. D., 1906, between John Doe and Mary Doe, his wife, both of Chicago, Cook County, Illinois, as parties of the first part, and Richard Roe, of Detroit, Wayne County, Michigan, as party of the second part.

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of one thousand (\$1,000) dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, do by these presents grant, bargain, sell, remise, release, alien and confirm unto the said party of the second part, and his heirs and assigns, forever, all that certain piece or parcel of land situate and being in the city of Cincinnati, county of Hamilton and state of Ohio, and described as follows to-wit:—

Lot numbered one (1) in Cosgrove's Addition to the said city of Cincinnati, as the same appears by the recorded plat thereof.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining: TO HAVE AND TO HOLD, the said premises, as herein described, with the appurtenances, unto the said party of the second part, and to his heirs and assigns, forever. And the said parties of the first part, for themselves, their heirs, executors and administrators, do covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, and at the time of the ensealing and delivery of these presents they are well seized of the above-granted premises in fee simple; that they are free from all incumbrances whatever and that they will, and their heirs, executors and administrators shall WARRANT AND DEFEND the same against all lawful claims whatsoever.

IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOHN DOE (L. s.)
MARY DOE (L. s.)

Signed, Sealed and Delivered
in Presence of

THOMAS WHITE
ANDREW BLACK

STATE OF MICHIGAN, }
County of Wayne, } ss.

On this first day of March, A. D., 1906, before me, a Notary Public in and for said County, personally appeared John Doe and Mary Doe, his wife, to me known to be the same persons described in and who executed the within instrument, who severally acknowledged execution of the same as their free act and deed.

WINTER WHITE,
Notary Public.

My commission expires March 6, 1906.

209. Quit Claim Deeds.—A Quit Claim Deed is a mere relinquishment to the grantee of whatever title, if any, the grantor has. It contains no covenants. The grantee accepts such a deed as a venture. He may acquire something by it, and he may not. The grantor in a quit claim deed assumes no liability.

210. Consideration.—It is not necessary that the consideration stated in the deed be the actual sum paid, although the true amount may be inserted if it is desired. Often the parties do not care to make the price public, and publicity may be properly and safely avoided by writing in "One Dollar and other valuable considerations," although the price paid may have been hundreds or thousands of dollars. If it ever becomes necessary, the real price paid may be shown by evidence other than the deed itself.

211. Execution and Delivery.—A deed, to be complete for all purposes, must be signed by the grantor and acknowledged before some proper officer whose certificate of acknowl-

edgment is added to the instrument. In some states two subscribing witnesses are required. Neither party to an instrument can become a witness to it, but any other person who can write may be, and this regardless of age or sex. As between the grantor and the grantee, acknowledgment and witnessing are not necessary. But no grantee should accept a deed omitting any formalities necessary to make it fully valid for all purposes.

If the grantor is a married man, his wife should join in making the deed. Otherwise she will retain her dower interest in the lands. In states recognizing a right of curtesy in the husband, he should join in all deeds in which his wife is grantor. Otherwise his interest by curtesy will remain in force. In most states curtesy has been abolished.

212. Delivery.—A deed becomes operative from the time it is delivered by the grantor, or his agent, to the grantee, or his agent. An undelivered deed is of no effect. A deed may be placed in escrow, for delivery upon the happening of a certain event (for example the payment of purchase price, or the death of the grantor) and it will operate from the date of final delivery, but not before.

213. Return of Unrecorded Deed.—Because the act of delivering the deed transfers the title to the grantee, he cannot, by handing back an unrecorded deed, restore the title to his grantor. A new conveyance must be made for that purpose.

214. Estates by Entireties.—In most states, a deed to a husband and his wife creates for their benefit what is known as “an estate by the entireties.” In such an estate, each, so the law holds, *owns the entire property*. Neither has any interest which can be conveyed without joining the other spouse in the deed. Upon the death of either, the survivor retains the entire estate, free from all liability for payment of the debts of the deceased spouse.

215. Execution of Deeds in Blank.—When a grantor signs a deed, leaving the date, consideration and name of the

grantee blank, and delivers it to an agent with instructions to fill up the blanks when the data therefor shall have been obtained, and to make delivery, such grantor will be bound by the deed when it has been so filled up and delivered.

216. Recording.—As between the grantor and the grantee, an unrecorded deed is valid. But it is the general rule that a third person who, without notice of the first deed, innocently gives value for, receives and records a second deed from the same grantor (or his assigns) takes a good title as against the first grantee whose deed was not recorded so soon. Therefore, self-protection suggests that all deeds should be promptly and properly recorded.

CHAPTER XVIII.

LANDLORD AND TENANT.

217. Lease.—The relation of landlord and tenant is created by contract. This contract is called a Lease. It may be verbal or written. If written it may be for any period, even 999 years. If verbal, it will not be valid for more than one year.

The lease confers upon the tenant the right of peaceable enjoyment of the leased premises, and upon the landlord the right to receive a compensation called "rent."

A lease may embody any lawful agreement into which the parties decide to enter. The following is a simple form:—

LEASE.

IT IS HEREBY AGREED, Between John Doe, of Chicago, Cook County, Illinois, as party of the first part, and Richard Roe, of Detroit, Wayne County, Michigan, as party of the second part, as follows: The said party of the first part, in consideration of the rents and covenants herein specified, does hereby LET AND LEASE to the said party of the second part, the following described premises, situated and being in the city of Detroit, county of Wayne and state of Michigan, to-wit:

Lot numbered ten in Cass Addition to said city of Detroit, as the same appears by the recorded plat of said Addition, for the term of one year from and after the second day of January, 1906, on the terms and conditions hereinafter mentioned, to be occupied for a residence and dwelling place only;

PROVIDED, That in case any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part, his certain attorney, heirs, representatives and assigns, to re-enter into, repossess the said premises, and the said party of the second part, and each and every other occupant, to remove and put out.

And the said party of the second part, does hereby hire the said premises for the term of one year as above mentioned, and does cove-

nant and promise to pay to the said party of the first part, his representatives and assigns, for rent of said premises for said term, the sum of twelve hundred (\$1,200) dollars, in twelve equal monthly installments of one hundred dollars each, payable monthly in advance, beginning with the date hereof, when the first installment shall be paid.

Said party of the second part further covenants that he will not assign or transfer this lease, or sub-let said premises, or any part thereof, without the written assent of said party of the first part.

AND ALSO, that said party of the second part will at his own expense, during the continuance of this lease keep the said premises and every part thereof in as good repair, and at the expiration of the term, yield and deliver up the same in like condition as when taken, reasonable use and wear thereof and damages by the elements excepted.

And the said party of the first part does covenant that the said party of the second part, on paying the aforesaid installments and performing all the covenants aforesaid, shall and may peacefully and quietly have, hold and enjoy the said demised premises for the term aforesaid.

The covenants, conditions and agreements, made and entered into by the several parties hereto, are declared binding on their respective heirs, representatives and assigns. Executed in duplicate.

WITNESS our hands and seals this second day of January, 1906.

JOHN DOE (L. s.)

RICHARD ROE (L. s.)

In Presence of
HENRY W. TOMPKINS,
GEORGE DUNHAM.

(The lease should be acknowledged if it is desired to record it.)

218. Duties of Landlord.—In all leases there is an implied covenant that the tenant shall have quiet enjoyment of the leased premises during his term, or so long as he shall not be in default.

219. Renewal.—If a lease contains a covenant for renewal "on the same terms" the law will enforce the renewal. But the renewal lease will not be required to contain a like clause providing that the lease may be again renewed "on the same terms," as this, would, in effect, give the lessee power of perpetual renewal.

220. Repairs.—A landlord is under no implied obligation to keep the leased premises in repair. He owes the tenant no

duty to repair. The fact that the premises are ruinous does not work any abatement of the rent.

A landlord is not liable to a tenant for damages resulting from the leased premises being out of repair, unless he has covenanted to keep them repaired.

ILLUSTRATION.—The chimney or a house became out of repair and fell through the roof, injuring the furniture of the tenants. The landlord had made no promise to keep the property in repair. Held, the tenants could not recover against him for the damage.

Payne v. Rogers, 2 H. Bl., 349.

When a landlord leases rooms in a building, retaining control of other parts of it himself, he will be liable for any injury arising to his tenants or others through his failure to keep the portion of the building under his control in a reasonable state of repair.

If the leased building is destroyed by fire, or otherwise, the landlord is under no implied obligation to rebuild.

In the absence of covenants to repair, the tenant is not bound to make repairs. If he makes them, he cannot (in the absence of agreement) compel his landlord to pay for them or to set them off against the rent.

221. Rent.—The tenant's chief duty is to pay the rent reserved in the lease. For non-payment he is subject to eviction. Usually, proceedings for eviction must be preceded by a notice to quit, given by the lessor to the lessee. This notice is the foundation of the proceeding for eviction. Like any other right, notice to quit may be waived.

222. Notice to Quit.—Notice to quit need not be in any special form. It should describe the premises with reasonable certainty. It may be substantially as follows:—

NOTICE TO QUIT.

To Richard Roe:

Please take notice that you are hereby required to quit, surrender and deliver up possession to me of the premises hereinafter described, which you now hold of me as my tenant, on or before the first day of

July, A. D. 1906, as I intend to terminate your tenancy, and to repossess myself of such premises on the date above mentioned, by reason of your default in payment of the rent by you covenanted to be paid.

Said premises are described as Lot numbered ten (10) in Cass Addition to the city of Detroit, Wayne County, Michigan, as said lot appears by the recorded plat of said addition.

Dated at Detroit, Wayne County, Michigan, the 20th day of June,
A. D. 1906.

JOHN DOE.

223. Reentry of Landlord.—When a lease has expired by limitation, or through breach of a covenant, as for example, non-payment of rent, the lessor has a right to enter upon the land (after notice to quit, where such notice is necessary) and to expel the tenant therefrom, if he can do so without committing a breach of the peace. *He must not use force or violence against the person of the tenant*, but he may in a peaceable manner remove the tenant's goods from the premises.

But if eviction cannot be accomplished peaceably and without force or violence, the landlord must resort to the courts to procure restitution of his property.

224. Destruction by Fire.—If a leased building is made wholly or partly untenable by fire, it is a general rule that the tenant is liable for the rent until the end of his term, unless the lease (as it always should) provides otherwise.

If the lessee has covenanted to keep the leased buildings in "as good a state of repair as they are in when taken," without qualifying the undertaking by excepting damage by the elements, he is required to repair the buildings if damaged, or to rebuild them if destroyed, unless the damage or destruction is caused by act of God or the public enemy.

225. Assignment of Lease.—A lessee may assign the whole or any part of his lease, unless he has covenanted against so doing. But to sub-let a part of the leased property does not violate a covenant not to assign the lease.

The assignee of a lease is liable to the lessor for the rent and for performance of the covenants of the lease, although the assignment contains no agreement to pay rent and no covenants.

REVIEW QUESTIONS

1. Define (a) Principal.
(b) Agent.
2. Name two kinds of agents and define each.
3. What is a "Power of Attorney"?
4. What is the highest duty of an agent?
5. Give each of three ways in which an agent may bind himself.
6. How should an agent sign?
7. What is the result to an agent if he disregards instructions?
8. What is meant by ratification?
9. How may the authority of an agent be conveyed?
10. Name five ways in which an agency may be terminated.
11. What constitutes a Partnership?
12. Name and define each of three classes of partners.
13. Name two kinds of partnerships as to their purpose.
14. By what kind of contracts may partnerships be created?
15. What of a partner's authority to loan the firm's money to himself?
16. Will the firm be bound if a partner borrows money ostensibly for the firm and then uses it for himself?
17. What is the partnership law regarding:
 - (a) Sharing losses and gains?
 - (b) Liability for firm's obligations?
18. In the absence of special agreements, what about the compensation of individual partners?
19. Name five ways in which a partnership may be dissolved.
20. Who should be notified in case of dissolution of partnership, and how?
21. What are the terms applied by law to the employer and employee?
22. Name four special duties of the employer.
23. What about assumed risks?
24. What about negligence of fellow servants?
25. What is meant by contributory negligence?
26. Tell what you know about the payment of an employee?
27. What is the duty of an employee?
28. Name five good causes for the discharge of an employee.
29. Give the employee's two remedies for failure to receive pay according to contract, or for wrongful discharge?
30. What is the law governing the salary of an employee who continues to serve after the expiration of a definite contract?
31. Name two kinds of carriers. Define each.
32. Give the liability of each class of carriers.

33. What can you say on the subject of "Limitation of Liability"?
34. What of a carrier's liability for his own negligence?
35. When is a stipulation as to value held valid?
36. May reasonable rules be lawfully prescribed by carriers, if brought to the attention of the shippers? If so, give an example.
37. What is the three-fold nature of a "Bill of Lading"?
38. What can you say regarding a draft with bill of lading?
39. What right of discrimination has a common carrier?
40. (a) Define "Stoppage in Transitu".
(b) When must this right be exercised, if at all?
41. Define the term Sale, using the technical terms applied to the seller and the buyer.
42. What is meant by the term "Caveat Emptor"?
43. What is a "Bill of Sale"?
44. What is the chief reason for requiring a bill of sale?
45. Name three requisites of a valid sale.
46. (a) What is the law governing loss or destruction of property during sale negotiations?
(b) When does title pass in a cash sale?
(c) When does title pass in a credit sale?
47. When is title passed on consigned goods?
48. Define "Latent Defects". Illustrate.
49. What is a "Title Note"?
50. What is the result of an unreasonable delay in the inspection of goods.
51. Will part payment bind the bargain in an oral contract for the sale of real estate? Why?
52. What is a "Land Option"?
53. (a) What is a "Land Contract"?
(b) What is the least that will constitute a sufficient consideration in a land contract?
54. Who are the parties of the first, and who are the parties of the second part, in a land contract?
55. Give two important facts regarding forfeiture.
56. By what means should you strive to receive title to real estate?
57. Of what should the buyer always assure himself regarding the examination of title? How? Why?
58. Name the covenants commonly contained in a "Warranty Deed".
59. Explain "Estates in Entireties".
60. What is the effect of executing and delivering a deed in blank?
61. How is the relation of landlord and tenant created? What called?
62. Give the general rights conferred upon a tenant by a lease.

63. What is the chief duty of the landlord?
64. Give five rules governing repairs.
65. What is the tenant's chief duty?
66. Give tenant's liability for rent in case of partial or entire destruction of tenement.
67. Give three steps sometimes necessary to the eviction of a tenant.
68. Give landlord's liability to tenant in case the tenement is partially or wholly destroyed.
69. What are the lessee's rights in regard to sub-letting?
70. What are the lessee's rights in regard to assigning?

PROBLEMS

1. A, the general agent for B, sells C goods at less than factory cost. Is B bound to deliver the goods? *Yes*

2. A, special agent for B, accepts a check in payment for goods, endorses the check "B by A" and collects the money at the bank. If A fails to turn the money over to B, is the bank liable for the amount of the check? *Yes*

3. A, special agent for B, without authority from B, accepts 50 per cent of the face of a poor account, and gives a receipt for full payment. He turns the money over to B. B, after some time, sues for the balance of the account. Can he collect?

4. A, a clerk for B, a grocer, buys clothing at the store of C without B's knowledge, giving C groceries in exchange. Is C liable to B?

5. A, a real estate agent employed by B, sells a piece of land to C. B has never seen the land. C pays A \$500 to represent the land to B as much less valuable than it really is, and thus is able to secure from A, with B's consent, a reduction of \$1000 in the purchase price. Is A liable to B? For what amount? Is C liable to either A or B?

6. A commission merchant innocently receives and sells a carload of stolen horses. Is he liable to the original owner of the horses?

7. A, agent for B, agreed to collect a claim from C for 50 per cent of all proceeds collected. After he had collected a portion of the claim he was discharged and another man employed to collect the balance due. Did A have any recourse? *Yes*

8. A, agent for B, is directed by B to handle the sale of a certain farm. Before the sale is completed B dies. Can A complete the sale?

9. A had a contract to drill a well. B allows A to use his drill

agreeing to accept one half of the profit. Is B liable for any indebtedness incurred by A while doing the work? *Yes, under the partnership agreement.*

10. A and B are partners in the drug business. A, without B's knowledge, mortgages the stock to secure a creditor. Is the mortgage legal? *Yes*

11. A and B are partners in the dry goods business. A signs the firm name to notes, discounts the notes and uses the proceeds for his own private interest. Is the firm liable? *Yes*

12. O and M, two attorneys, form a partnership. M borrows money on the firm's note without O's knowledge or consent. The money is used for partnership purposes. Is the firm liable? *Yes*

13. C and D are partners in the clothing business. C owes a private debt of \$500. He signs the firm name to a note for the amount. Is the firm liable? *No*

14. A and B are partners in the automobile business. A is injured and is absent from the business for six months. Can B collect from A for extra work done on account of A's absence? *No*

15. D, M, and O are partners. O retires from the firm, but gives no notice to that effect. Is he bound by obligations assumed in the firm name after his withdrawal? *Yes*

16. E spends the summer visiting F. He helps with the farm work, and later, though there was no understanding that he was to work or to receive any pay, he sues F for the value of his services. Can he recover? *No*

17. A is employed by B to clean up about the wreck of an old mill. A tottering wall falls on A and injures him. Is B liable? *No*

18. While A is working in B's factory he is injured by a boiler explosion. Is B liable? *Yes*

19. P, a young man, is employed by R, a chemist. P is told to mix certain elements. Great care is necessary in the mixing to avoid an explosion. R does not warn P. An explosion takes place and P is injured. Is R liable? *Yes*

20. A employs B and C in his factory. B is known to be a heavy drinker. B comes to work in an intoxicated condition. Because of B's condition an accident takes place. C is injured. Is A liable? *Yes*

21. C is operating a threshing machine for X. While oiling the machinery he is injured. Is X liable?

22. Through a mistake of C, a switchman on the railroad, the switch engine is derailed and A, another switchman, is injured. Is the railroad liable to A?

23. A, a mine owner, orders B, an employee, to repair the roof

in a certain portion of the mine. There is grave danger of a fall of slate at this point. The slate falls and B is permanently injured. Is A liable? *yes*

24. G has household goods stored in a warehouse. The warehouse is struck by lightning and the goods are burned. Is the owner of the warehouse liable? *no*

25. A ships a car of potatoes from Minneapolis to Des Moines. En route the car catches fire from some burning ties beside the track and the potatoes are ruined. Is the railroad company liable? *no*

26. A carload of apples en route from Kansas City to Omaha is badly frozen by a sudden cold spell. Is the railroad company liable?

27. A produce dealer has a contract with a drayman to haul all his produce to the freight house. It is stipulated in the contract that the drayman shall not be held liable for damages unless caused by his own carelessness. A run-a-way team collides with the dray, it is overturned and several cases of eggs broken. Is the drayman liable for the loss? *no*

28. The U. P. R. R. accepted a carload of hogs for transportation from Denver to Chicago. A contract was signed by the shipper relieving the U. P. from liability after the car should be transferred to the C. & N. W. R. R. After the transfer took place the C. & N. W. train was wrecked and the hogs damaged. Was the U. P. R. R. liable? *no*

29. A shipper delivered to an express company a box of cut glass declaring the value to be \$25. The real value was \$100. A less rate was charged than would have been, had the true value been declared. The box was lost. For how much was the express company liable? *no*

30. The C. R. I. & P. R. R. has a rule charging \$1.00 per day on all cars that are not unloaded within 24 hours. A shipment of household goods is delivered by this railroad at Des Moines, for A. A fails to unload the car for 10 days. Can the railroad collect demurrage?

31. A commercial college sends the Ellis Publishing Co. an order for \$300 worth of books, sending \$100 with the order. The shipment is made with draft for \$200 attached to bill of lading. When do the books become the property of the school?

32. A pays a rate of \$20 per car on cattle shipped to Chicago. B pays the same rate but gets a rebate of \$2.00 per car. Is the railroad liable to A? For how much? *no*

33. A shipper sells goods to Jones, and after the goods have been shipped he discovers that Jones is insolvent. Can delivery be stopped? *no*

34. Suppose in the above question the shipper knew Jones to be insolvent when the shipment was made? *no*

35. A ships goods to B, terms cash. When does the title pass to B? *When c*

36. A ships goods to B, terms cash 30 days. When does the title pass to B? *and*

37. The Ellis Publishing Company had arranged for the sale of text books to a school, the invoice to be paid six months from date of shipment. The boxes of books have been delivered at the station in Battle Creek for shipment. The station is burned and the books destroyed. Can the Ellis Publishing Company collect payment from the school? *Yes*

38. M bought of C on contract, 60 acres of corn in the field, with the provision that the corn was to be husked by C and placed in M's cribs. The corn in the field is injured by hail. Who stands the loss? Would it make any difference whether the contract provided payment at an agreed price per bushel under the above conditions, or a lump sum for the entire amount of corn? *Yes*

39. A ships text books to B on consignment, to be paid for when sold. When does the title pass to B? *When sold*

40. A ships apples to B on contract, guaranteeing them to be in first class condition. After B has had the apples in his warehouse for a month he opens the barrels and inspects them, finding them in poor condition. Can A collect full value for the apples? *Yes*

41. A sells Baldwin apples to B. B opens and inspects several barrels, removing the covers and two or three of the top layers. Afterward it is found that the lower half of each barrel is filled with inferior apples of another kind. Is A liable for damages? *Yes*

42. A grocer purchased a car of peaches from a jobber in a neighboring city. No stipulation as to quality was made. Was the vendor liable? *Yes*

43. Number one wheat was sold for future delivery. On delivery it was found to be moldy. Could the purchase be rescinded?

44. A school superintendent orders of a publisher a text in English suitable for the freshman year in the high school, and states in the letter, "If you have such a book that you can recommend, ship fifty at once and send bill to me." The publisher ships books designed for use in college English. Can he collect from the superintendent?

45. The proprietor of a market sells tainted meat. Is he liable for damage caused by eating the meat? *Yes*

46. An agent sells dress goods from sample. The goods are inferior to the sample. Can the purchaser be held for payment?

47. E purchases from W, a home, contracting to pay a certain amount down each month, interest included in the payment. E fails

to make the payments regularly, but does make occasional payments. After two years W seeks to obtain possession of the property. E then tenders the balance due with interest. Can W take possession, or must he accept the balance due and deliver deed?

48. A deeded to B 160 acres of land, "more or less." The tract was afterward found to consist of but 154 acres. Has B any remedy?

49. The roof of a house became leaky and the furniture of the tenant was damaged by the water. The landlord had made no agreement to keep the property in repair. Could the tenant recover damages? *yes*

50. In the above, could the tenant recover damages if the landlord had contracted to keep the premises in good repair? *yes*

Banking.

COMMERCIAL PAPER,
LEGAL HISTORY OF A BILL OF EXCHANGE,
LEGAL HISTORY OF A NOTE,
NEGOTIABLE INSTRUMENTS.

CHAPTER XIX.

BANKING.

226. Banks.—As to organization, banks are National, State or Private. National Banks are corporations organized under the laws of the United States. State Banks are corporations organized under the laws of some particular state. Private Banks are unincorporated concerns, usually unrestricted by state or federal supervision, and generally conducted under sole ownership or partnership organization.

Savings banks exist under the laws of most of the states. These banks are generally empowered to loan a portion of their deposits upon real estate securities. They usually invite small as well as large deposits, and pay a low rate of interest upon balances left for deposit during a specified time. They issue pass books evidencing the deposits made and containing the terms on which deposits are received. These terms, in general, amount to a contract between the depositor and the bank. They should therefore be examined carefully by the depositor, so that he may know his rights and the bank's duties.

227. General Deposits.—When one makes a general deposit upon open account in a bank, the bank merely becomes the depositor's debtor for the amount deposited. The money thus put into the bank becomes the bank's property. If lost or stolen, the bank must bear the loss. No matter what becomes of the money deposited, the bank must return to the depositor a like amount on demand. This demand is made by check. A check is a written order directed to the bank requiring it to pay a certain sum of money to a certain person therein

named, or to his order, or to bearer, upon presentation. Presentation of a check for payment is a demand of payment. If a bank, having sufficient of the depositor's funds on deposit to meet the check, refuses payment, the bank will be liable to the depositor for all damages arising from the non-payment.

ILLUSTRATION.—Svendsen drew two checks, one for \$2.15 and one for \$54.60. He had on deposit \$235.22. By error the bank had charged against him a note of \$300 owed by him to the bank, but not then due. Mistakenly believing Svendsen's account overdrawn, the bank refused payment of the two checks. The court held that Svendsen was entitled to recover from the bank substantial damages for the injury occasioned to his credit by the non-payment of these checks.

Svendsen v. State Bank, 64 Minn., 40.

228. Presentation of Check.—A Check should be promptly presented for payment. If the person who receives the check and the bank upon which it is drawn are in the same place, the check must (in the absence of some sufficient excuse) be presented on the same day or, at latest, before the close of business hours on the day after it is received. If the person who receives the check and the bank on which it is drawn are in different places, the check must be forwarded for presentation on the day it is received, or, at latest, on the day after it is received, and the agent to whom it is sent must present it, at latest, before the close of business hours on the day after he receives it. This rule may be varied only by showing strong reasons for non-compliance.

ILLUSTRATIONS.—(I) Tamlin sold Simpson live stock to the amount of \$929.46, for which Simpson gave two checks drawn Dec. 13, 1893, on the Cass County Bank of Atlantic, Ia. This bank failed Dec. 27, 1893. Hamlin had failed to present the checks for payment. The court held that Hamlin must bear the loss occasioned by the failure. Had Hamlin presented the checks promptly, as prescribed by the rules above stated, the loss, if any, would have fallen upon Simpson.

Hamlin v. Simpson, 105 Ia., 125.

(II) Rothwiler, while at a lumber camp about twenty miles northeast of Cadillac, received in payment of a bill a check of \$66 drawn on a Cadillac bank. He immediately proceeded to Cadillac, but reached the bank after it had closed for the day. The next day being Sunday,

he went to his home at Reed City, about twenty-seven miles south of Cadillac. On Monday morning he deposited the check with a Reed City bank for collection. The check was immediately forwarded, but reached Cadillac after the bank on which it was drawn, had failed, the failure having occurred on Monday. It was held that Rothwiler had used reasonable diligence and that the depositor who had drawn the check must bear the loss.

Freiberg v. Cody, 55 Mich., 108.

229. Stoppage of Payment.—Payment of a check may be countermanded by the drawer at any time before the bank has made acceptance or payment. To stop payment, the drawer merely gives the bank a description of the check together with instructions not to pay such check upon presentment.

230. Check Not an Assignment.—A Check does not operate as an assignment to the payee of any part of the drawer's funds on deposit. The bank is not liable to the holder of the check *until it accepts or certifies the instrument*. But when the bank has accepted or certified a check, it is bound to make payment of the same on demand.

ILLUSTRATION.—A cattle company sent a bank the following telegram: "Will you pay James Tate's check on you for \$22,000? Answer." To which telegram the bank replied: "James Tate is good. Send on your paper." Although James Tate did not have \$22,000 on deposit, the bank was held liable for payment of the check. *(The bank's telegram was held to be an acceptance)*

Garrettson v. N. Atchison Bank, 39 Fed. Rep., 163.

231. Certified Checks.—A check is certified by the cashier of the bank on which it is drawn writing the word "certified," or some equivalent expression, across the face of the instrument and signing his name thereto as cashier. The amount of the check is immediately charged against the drawer's account and the bank assumes payment. If a check already certified is received in payment of debt, and the certifying bank is insolvent, or fails before the check can, in the exercise of proper diligence, be presented for payment, the drawer will remain liable for the debt which the check was given to pay.

But when one who has received a check in payment of a debt, thereafter causes the check to be certified, the drawer and all indorsers are thereby discharged from liability.) The reason for this is that, at the time the check was certified, demand for payment might have been made. The holder of the check, having elected not to demand payment at that time, and having chosen instead to rely upon the bank's credit, must abide by the consequences of his choice.

232. Forged Checks.—Forgery is punishable as a crime; yet it is a danger which constantly menaces banks. Since a bank must not pay out deposits except on valid orders from its depositors, it follows that, if a bank pays out money on a forged check, the bank can not charge the amount so paid against the account of its depositor, unless the depositor's negligence has in some way contributed to induce the payment.

(A bank is bound absolutely to know the signature of its depositors.) If a bank pays a check bearing the forged signature of a depositor, it can not, in general, recover the amount from a *bona fide* holder to whom it has made payment.)

But if a bank pays a "raised" check, (i. e. a check in which the original amount has been increased by forgery) it may recover the amount of the fraudulent increase, even from a *bona fide* holder to whom the bank has made payment. This relief is granted the banks because, while a bank must know its depositor's signature, it can not be presumed to know what he has written in the check.

233. Returned Checks.—It is generally held to be the depositor's duty to examine the paid checks returned to him by the bank, and if he negligently fails to detect forgeries he must generally bear the loss.

ILLUSTRATION.—Allen, a depositor, sued to recover money which had been paid out by the First National Bank of Birmingham, Alabama, on eight checks charged to his account. On all of these checks Allen's signature had been forged. The forgeries covered a period of about six months. At the end of each month, the bank had returned Allen his paid checks, together with his posted up pass book. He had negli-

gently intrusted the examination of his pass book to his clerk, who was the forger. Under this state of fact, and because of Allen's negligence in not making personal examination of the checks, it was held that he, and not the bank, must suffer the loss.

First National Bank of Birmingham v. Allen, 100 Ala., 476.

234. Special Deposits.—When money is deposited with and accepted by a bank to be paid out for a special purpose, the money does not become the property of the bank and the relation of debtor and creditor does not exist between the bank and the maker of the special deposit.

ILLUSTRATION.—Kimmel deposited \$265 with the Douglas County Bank at Armour, South Dakota, to be paid over to Ward upon presentation of a warranty deed and an abstract of title conveying certain lands to Kimmel. The bank accepted the deposit with the understanding that it was to be held for the purpose stated. (Before Ward presented the deed, the bank failed.) It was held that Kimmel was not a general creditor of the bank, like ordinary depositors, but that he was entitled to have his special deposit repaid to him in full before the general depositors received anything.

Kimmel v. Dickson, 5 S. D., 221.

235. Set Off.—The relation between a bank and its depositor being that of debtor and creditor, the bank is bound to pay all checks of the depositor as long as it has sufficient funds in its possession for that purpose. But when a depositor owes a bank a matured debt, it is equally the right of the bank to set off such debt against funds credited to the debtor on its books. In other words, the bank may appropriate a deposit to the payment of a matured debt due from the depositor to the bank.

236. Instruments Payable at Bank Treated as Checks.—A bill or note made payable at the bank where the obligor keeps his account is equivalent to a check drawn by him on that account. The bank may make payment and charge the paid instrument against the account of the obligor.

237. Overdrafts.—When a bank has paid its depositor's checks to an amount exceeding the deposit, the depositor is said to have made an overdraft. The overdraft forms a debt

due immediately from the depositor to the bank. The rules of most banks very properly prohibit overdrafts.

238. President.—The president of a bank has no authority to act as its agent, except as such power is conferred upon him expressly or by necessary implication. His authority is to be ascertained from the statutes under which the bank is conducted, the charter, the by-laws and the adopted motions or resolutions of the board of directors.

239. Vice-President.—During the absence or disqualification of the president, the vice-president may exercise all powers ordinarily exercised by the president.

240. Cashier.—While the cashier may be given express authority to carry out any transaction or class of transactions delegated to him by the board of directors, his implied authority is limited. In the absence of express authority, he has power to bind the bank only when he acts within the general scope of his ordinary duties. He can not go beyond these without special authority from the board of directors. As to third persons he has, by reason of his position, the right to receive payment of debts and to cancel obligations and surrender up securities, but he has no implied power to receive payment in anything other than money, nor can he make binding contracts outside the scope of his ordinary duties.

ILLUSTRATION.—The cashier of a Columbus bank, without special authority, gave to Miner, one of its directors, a letter to the Secretary of the Treasury of the United States, to the effect that Miner had authority to contract in behalf of the bank for the transportation of money for the government from New York to New Orleans. Relying upon this letter, the Secretary of the Treasury entered into such a contract with Miner and delivered Miner \$100,000 of the government money to be so transported. Miner received the money but never delivered it. Still relying upon its supposed contract with the Columbus bank, the United States brought suit against the bank to recover the amount intrusted to Miner. The court held that, as the cashier had never been given authority by the bank to make contracts for the transportation of money, the contract made by the cashier with the

government through Miner did not bind the bank, and that the bank was under no liability on account of the transaction.

United States v. City Bank of Columbus, 62 U. S., 21 Howard, 356.

241. Powers of Directors.—The directors of a bank have full power to manage and control its affairs within the limit of its charter purposes, but not beyond. They may delegate special duties to the president, cashier and other officers, but they can not confer upon another a power which they do not themselves possess. For example, they can not authorize the president or cashier to speculate in stocks, real estate or other property. In general, a bank can not own stocks in other corporations, except when it acquires them for the purpose of protecting itself against imminent loss. A bank may buy real estate necessary for the conduct of its business, but it cannot purchase real estate for speculative purposes, nor can it buy land generally, except to protect itself against loss.

242. Liabilities of Directors.—Except when otherwise provided by statute, bank directors who receive no pay for their services are not responsible to the bank for anything short of gross negligence, fraud or reckless inattention to duties, whereby frauds are permitted. Where they have discretionary powers, they will not be liable for a mistaken use of the discretion, even though loss ensues.

ILLUSTRATION.—The Penn bank of Pittsburg failed because of the withdrawal of its funds by its president for use in his private speculations. The directors had been in the habit of holding weekly meetings for the purpose of passing upon discounts, and at these meetings the president and cashier presented reports concerning the condition of the bank. The directors did not attempt to go to the source of these reports, but accepted them as true. After the failure, an attempt was made to hold the directors liable to depositors for the amount lost. It was claimed that the directors should have gone to the books of the bank, and that they should have examined the bank's securities in person, and that they should not have relied upon the unverified statements of the president and cashier. But the court held that the directors, having acted in good faith and without gross negligence or reckless inattention to duties, *were not liable* to the depositors for the loss.

Swentzel v. Penn Bank, 147 Pa., 140.

243. Collections. By the weight of authority, a bank that receives for collection the note, draft or other claim of a customer upon a party residing at some distant point, is liable for the loss of the proceeds of the collection through the failure or default of a correspondent to whom the bank has sent the draft for collection. Thus, if A delivered a note to B, a bank, for collection from C at some distant place, and if B sent the note to D, its correspondent bank, and if D collected the note and kept the proceeds, B would, under the principle just stated, be bound to bear the loss and to pay A the full amount collected by D.

The courts of many of the states deny this doctrine and hold that, when a note, draft or other claim is left with a bank for collection in the usual course of business, and the bank transmits the claim, accompanied by proper instructions, to a correspondent of supposed responsibility, selected with reasonable care, the forwarding bank will not be liable to the owner of the claim if the correspondent makes the collection and misappropriates the proceeds.

ILLUSTRATION.—Daly deposited certain drafts with the Butchers & Drovers Bank of Kansas City, Mo., to be transmitted to Vicksburg for collection. The latter sent the drafts to the National Bank of Vicksburg, which it believed trustworthy, with instructions to collect and remit. The Vicksburg bank collected the money and kept it, and became insolvent. The court held that the Butchers & Drovers Bank was not liable to Daly for the loss.

Daly v. Butchers & Drovers Bank, 56 Mo., 94.

On this subject, the student is advised to ascertain the law as laid down by the courts of his own state.

CHAPTER XX.

COMMERCIAL PAPER.

244. Classes of Paper.—Commercial paper includes all transferable written instruments used in carrying on trade and commerce. Bills of lading, warehouse receipts, stock certificates, checks, drafts, certificates of deposit, promissory notes, money bonds and coupons are the kinds of commercial paper most commonly in use. Unless restricted by their own terms, all of these instruments are readily transferable and the purchaser takes at least as good a title to the instrument as was possessed by his transferor. Under some circumstances, the purchaser of certain of these instruments may actually take a better title and broader rights than his transferor possessed. The kinds of paper to which this advantage applies are called Negotiable Instruments.

245. Negotiable Instruments.—While money-bonds, stock certificates and other securities possess characteristics of negotiability, bills of exchange and promissory notes are the only strictly negotiable instruments. Bills of exchange are checks and drafts. Promissory notes include ordinary notes of hand and also certificates of deposit issued by banks.

246. Advantages of Negotiability.—In general any instrument, whether negotiable or not, may be bought and sold. Thus, an account may be transferred by assignment and the transferee will be substituted to all rights of the transferor. But the transfer of a non-negotiable instrument is subject to this infirmity—the transferee merely “stands in the shoes” of the transferor. Defenses good against the seller of a non-negotiable instrument may be urged with equal force against the

purchaser of it. The fact that the purchaser of non-negotiable paper has given value for it and that he bought it innocently and before it was due, will not generally protect him against defects in his transferor's title. If the transferor's title was imperfect, the transferee's title will be likewise imperfect. The purchaser of a *non-negotiable* instrument, like the purchaser of any other chattel, *buys at his own peril*.

Not so with the purchaser of a negotiable instrument who becomes a holder in due course. As such holder, he takes perfect title to the paper, although his transferor's title may have been defective. Unless the instrument is a forgery, or the equivalent of a forgery, or is for some other reason void, the holder in due course can collect it, although it may have been stolen from the maker and the transferor may have been the thief.

247. Holder in Due Course.—One can not become a holder in due course unless the paper is complete and regular upon its face, and unless he purchases in good faith, without notice of defenses before maturity and for value.

If the instrument is obviously incomplete or irregular, one can not become a holder of it in due course. The defect apparent upon the face of the instrument itself is notice to him that something is wrong, and if he buys he takes subject to such notice. He is put upon inquiry by the defect. It becomes his duty to investigate. If he neglects this duty he must suffer the consequences.

One can not become a holder in due course of paper which he knows has been dishonored, or against which he knows a defense is claimed. So one can not become a holder in due course of over-due paper, because the fact that payment was not made at maturity is an indication that there is something wrong.

Nor can a person become a holder in due course of paper for which he has not given adequate value.

ILLUSTRATION.—A note of \$300 given by a responsible person was sold for \$5. The court held that the purchaser was not a holder in due course.

DeWitt v. Perkins, 22 Wis., 451.

Nor can one become a holder in due course of paper which he has not purchased in good faith. Thus, one holding a bill or note against which there is a defense, can not, by collusion, turn the obligation over to some third person and thereby constitute the latter a due course holder. Were this otherwise, anyone holding an instrument against which defenses are claimed, might, by agreement, place the instrument in the hands of a third person, who would then have power to collect it without regard to the rights of the obligor.

When one having no express or implied notice of defects or defenses, gives adequate value for a negotiable instrument not over-due, (he has a right to collect it) provided the instrument is itself valid. Set-offs and recoupments which might have been valid against the instrument in the hands of the transferor or other holders, can not be applied to the instrument when it is in the hands of *a holder in due course*.

248. Transferee of Holder in Due Course.—One who derives his title to an instrument through a holder in due course thereof, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of his transferor as to parties prior to such transferee.

249. Persons Not Holders in Due Course.—One who purchases a negotiable instrument under circumstances which prevent him becoming a holder in due course, takes the instrument subject to all the defenses that could be made against it if it were non-negotiable. In other words, (the special legal advantages surrounding negotiable instruments are available to holders in due course only.)

250. Reason for Protecting Holders in Due Course.—Negotiable paper is given special advantages for the purpose of encouraging its use. There is not enough money in the world to enable the transaction of the world's business. The deficit is covered by the use of commercial paper. Moreover, the carrying of money and its transportation from place to place, particularly in large sums, is both inconvenient and dangerous.

Thus the check, the draft, and the promissory note have come to be as necessary as money itself to the welfare of trade. Under this special protection afforded by law to holders in due course, these instruments pass from hand to hand very much like money. The greater portion of trade is carried on by their use. (Commerce is facilitated by them) They are as necessary as the railroad, the telegraph and telephone to modern business. They enable credit to stand in the place of cash. They do away with the slow process of counting and the dangers of transportation. By filling the gap between the actual money of the country and the volume of the country's business, they render our financial system elastic and self-regulating. For these reasons, the use of negotiable paper is encouraged by the law.

251. The Negotiable Instruments Law.—More than one half of the states in the Union have adopted practically uniform statutes known as the (Negotiable Instruments Law) This law renders certain much that was formerly uncertain and in dispute.

In the preparation of this treatise, the Negotiable Instruments Law has been followed, partly because it is the statute law in a majority of the states, and partly because it declares the most advanced position yet attained in the law of negotiable instruments. Moreover, in its main features, this legislation expresses the general law of negotiable instruments as applied in all of the states of the Union.

The Negotiable Instruments Act has been adopted at this time (January 1, 1909) in Alabama, Arizona, Colorado, Connecticut, District of Columbia, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, West Virginia, Washington, Wisconsin, Wyoming.

(The Negotiable Instruments Law deals with bills of exchange and promissory notes) only. These are the only truly negotiable instruments.

252. Bills of Exchange.—A Bill of Exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed and determinable future time, a sum certain in money to order or to bearer. Bills of exchange are more familiarly known as checks and drafts. When we speak of bills we mean both checks and drafts. Bills of exchange are referred to as “bills” for the sake of brevity.

Bills of exchange are of two classes, foreign and inland. When a bill (i. e. a check or draft) is both drawn and made payable within one and the same state, it is an inland bill. All others are foreign bills. Thus, a check drawn in Springfield, Ill., payable in Chicago, Ill., is an inland bill. But a check drawn in Indianapolis, Ind., payable in Chicago, Ill., is a foreign bill.

253. Promissory Notes.—A negotiable promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a certain sum of money to order or to bearer. For the sake of brevity we shall hereafter refer to promissory notes as “notes.”

CHAPTER XXI.

THE LEGAL HISTORY OF A BILL OF EXCHANGE.

254. Issue of Bill.—Mulford & Co., of Chicago, having sold goods in the amount of \$500 to George Grant, Detroit, Mich., upon the latter's agreement to accept their draft drawn payable ten days after sight, drew and discounted at the Bank of Commerce, Chicago, the following instrument:—

\$500.00

CHICAGO, ILL., January 2, 1906.

Ten days after sight, pay to the order of Bank of Commerce (Chicago, Ill.) Five hundred dollars. Value received and charge the same to account of

MULFORD & Co.

To GEORGE GRANT,
Detroit, Mich.

255. Parties to the Bill.—The original parties to the foregoing draft were therefore as follow: Mulford & Co., drawers; George Grant drawee; Bank of Commerce, payee. The Bank of Commerce placed its name upon the back of the draft as follows:—

“Pay to the order of Home Savings Bank, Detroit, Mich.
Bank of Commerce, Chicago, Ill.”

By thus writing its name upon the draft the payee became an indorser.

256. Presentation and Acceptance.—The Bank of Commerce immediately sent the draft by mail to the Home Savings

Bank, Detroit, Mich., for presentment to the drawee for his acceptance. The messenger of the Home Savings Bank promptly presented the draft to the drawee, who wrote across *the face* of the instrument as follows:—

“Accepted,
Jan. 4, 1906.
GEORGE GRANT.”

This amounted to a proper acceptance of the draft. Grant's relation to the accepted instrument became precisely the same as though it were a promissory note made by him.

257. Maturity.—The draft now had ten days to run before falling due. It therefore became payable January 14th, under the rule that, “where an instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment.”

But the 14th day of January, 1906, on which the draft became payable, fell upon Sunday. The instrument was therefore properly presented for payment on the following Monday, (January 15th).

258. Dishonor by Non-Payment.—Upon presentment for payment, Grant dishonored the draft. That is to say, he refused to pay it. As the draft was a foreign bill, it became *necessary* for its holder, the Home Savings Bank, to protest it for non-payment.

259. Protest.—A draft is protested by making and attaching to it a certificate of protest made, usually, by a Notary Public, under his seal. The purpose of this certificate is to place in the hands of all future holders of the instrument proof that the instrument has been presented to the proper person for honor and that he has dishonored it. In this case the certificate of protest would be in the following form:—

CERTIFICATE OF PROTEST.

STATE OF MICHIGAN, }
County of Wayne, } ss.

BE IT KNOWN, That on the 15th day of January in the year of our Lord one thousand nine hundred and six, at the request of Home Savings Bank, of Detroit, Michigan, I, Winter White, a Notary Public, duly commissioned and sworn, residing in the city of Detroit, Wayne County and State aforesaid, did present the original draft which is hereto attached, at the place of business of George Grant, the drawee and acceptor thereof, in said city of Detroit and demanded payment thereof which was refused.

Whereupon, I, the said Notary, at the request aforesaid, did PROTEST, and by these presents do solemnly protest, as well against the drawers, makers and indorsers of the said draft as against all others whom it doth or may concern for exchange, re-exchange, and all costs, charges, damages and interest already incurred and to be incurred by reason of the non-payment of the said draft.

And I, the said Notary, do hereby certify, that on the same day and year aforesaid, due notice that said draft had thus been presented for payment and that payment thereof had been thus demanded and refused, and that the holders of the said draft did and would look to the drawers, makers and endorsers thereof for payment of the same, were put into the Post Office at Detroit, Michigan, with the full legal postage paid thereon, and directed as follows, after diligent inquiry being made for the residence and place of business of the drawers and indorsers:—

Notice for Mulford & Company, Directed Room 9, Worcester Building,
Chicago, Illinois.

Notice for Bank of Commerce, Directed Chicago, Illinois.

Each of the above named places being the reputed place of business of the person to whom the notice was directed.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal of office.

WINTER WHITE,

Notary Public in and for Wayne County, Michigan.
My commission expires March 6, 1906.

[SEAL]

260. Notice of Dishonor.—In this case (as is customary) the Notary sent to the drawers and indorsers the necessary notice of dishonor. This, however, was not his official duty. In sending the notices he acted merely as any other agent of the holder might have done. It is the holder's duty to give

such notice, or to see that it is given. If the Notary does not attend to it, the holder, or some other agent of the holder, *must*. No special form of notice is required by law. The following form is sufficient:—

NOTICE OF NON-PAYMENT.

DETROIT, MICH., January 14, 1906.

TO MULFORD & Co.,
Chicago, Ill.

Gentlemen:—

Please take notice that a draft dated January 2, 1906, for Five Hundred Dollars, drawn by you upon George Grant, and by him accepted, payable ten days after sight, at Detroit, Mich., is now due and is delivered to me by the cashier of the Home Savings Bank, Detroit, Mich., for protest for non-payment, the same not being paid, and payment thereof having been demanded and refused; and that you are held liable for payment thereof.

Notice has been mailed to Bank of Commerce, Chicago, Ill., indorser.

Respectfully,

WINTER WHITE,
Notary Public.

261. Discharge for Want of Notice.—When a draft has been dishonored, the drawers and indorsers are discharged from liability thereupon if they are not given prompt notice of the fact of the dishonor. This notice may be either verbal or in writing. In practise, written notice is usually given as it is more readily capable of proof. A drawer or indorser may waive notice either by words or by acts. One who has waived notice is not entitled to it.

262. Settlements After Dishonor.—The draft in question having been properly protested and notice having been given to the Bank of Commerce and Mulford & Co. the Bank of Commerce would be obliged to return to the Home Savings Bank any funds which the latter had invested in the paper, together with the cost of protest and notice. The Bank of Commerce would then proceed to collect back from Mulford & Co. such sums as the bank had advanced upon the paper, together with interest and expense. Mulford & Co. would then proceed to enforce their claim against Grant in the same manner as though they were the holders of his note.

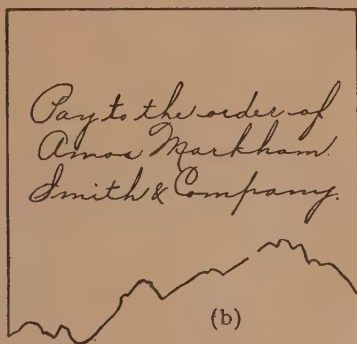
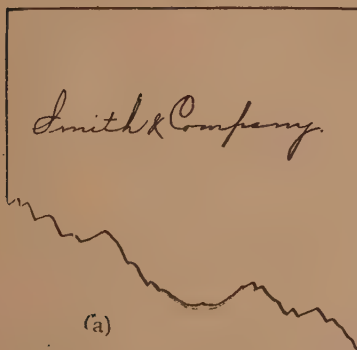
CHAPTER XXII.

THE LEGAL HISTORY OF A PROMISSORY NOTE.

263. Issue of Note.—Charles Wilson, of Chicago, purchased from Smith & Co., of New York, goods to the value of \$1,000 for which he made payment by delivering to Smith & Co. the following negotiable note upon which Henry Manning was surety.

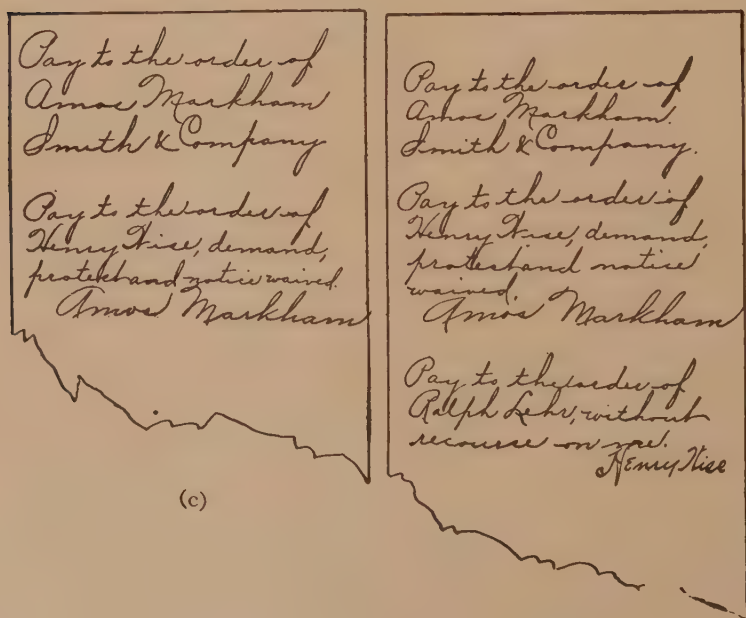
No. _____	<u>Chicago Ill, Jan 2, 1906.</u>
<u>Sixty days</u>	after date <u>I</u> promise to pay to the order of
<u>Smith & Co.</u>	<u>\$1000⁰⁰</u>
<u>One Thousand</u>	DOLLARS
payable at <u>Seventh National Bank</u>	Interest at <u>6</u> per cent. Value received.
<u>New York, N.Y.</u>	
Due _____	<u>Charles Wilson</u> <u>Henry Manning</u>

264. Indorsement in Blank.—Upon receiving the note, Smith & Co. wrote their firm name across the back of it (i. e. indorsed it in blank). (a). This made the note transferable



by delivery. The note thus indorsed passed into circulation and was transferred without further indorsement through the hands of several parties, until it finally came into the possession of Amos Markham.

265. Indorsement in Full.—Markham, being a careful man, and knowing that the note indorsed in blank (hence payable to bearer) was subject to loss by theft, wrote above the blank indorsement of Smith & Co. the words "Pay to the order of Amos Markham," thus converting the blank indorsement into a special indorsement (sometimes called an "indorsement in full"). (b). This he, or any other holder, had a perfect right to do. The act in no way increased the liability of Smith & Co., hence they could not object. By making the indorsement special, Markham made the note non-transferable as commercial paper, until such time as he himself indorsed it. This made the paper unavailable to any person who might come into possession of it wrongfully.



266. Waiver of Rights by Indorser.—Later, Markham sold the paper to Henry Wise, who insisted upon Markham's indorsement being so made that Markham would not be able to escape liability in case of any failure to present the paper for payment at maturity, or in case of failure to give Markham notice of non-payment. (In other words, Wise declined to purchase the note unless Markham would indorse it in full and with demand, protest and notice waived. (c).

267. Indorsement Without Recourse.—Wise then sold the note to Ralph Lehr. *Desiring to escape all liability*, Wise indorsed in full, but qualifiedly (i. e. without recourse). (d). This form of indorsement left Wise free from any obligation as an indorser upon the paper. Lehr then transferred the note to Theron Wilson, indorsing in full, and guaranteeing payment. (e).

268. Guaranty of Payment.—Under this guarantee Lehr would be liable to subsequent holders for payment of the note, even though demand and notice were omitted, provided Lehr suffered no damage by the omission, and provided no extension or other change of the terms of the note were made without his consent. (See Guarantors.)

269. Restrictive Indorsement.—The note being now almost due, Wilson deposited it with the Bank of America, New York, for collection, indorsing it restrictively. (f). The Bank of America presented the note for payment on the day of maturity, at the office of the Seventh National Bank, New York, where it was made payable.

270. Dishonor and Notice of Dishonor.—Payment was refused. Notice of dishonor was therefore necessary to all parties entitled to it. This notice may be given verbally or in writing. In practise, it is usually given in substantially the same form as notice of dishonor of a bill. (See Sec. 260.) Protest of the note was proper and customary, but *not necessary*. (Foreign bills of exchange are the only instruments

Pay to the order of
Amos Markham
Smith & Company.

Pay to the order of
Henry Wise, demand,
protest and notice waived
Amos Markham

Pay to the order of
Ralph Lehr, without
recourse on me, ^{Henry Wise}

Pay to the order of
Theron Wilson, prompt
payment at maturity
guaranteed. Ralph Lehr

(e)

Pay to the order of
Amos Markham
Smith & Company.

Pay to the order of
Henry Wise, demand,
protest and notice waived
Amos Markham

Pay to the order of
Ralph Lehr without
recourse on me, ^{Henry Wise}

Pay to the order of
Theron Wilson, prompt
payment at maturity
guaranteed. Ralph Lehr

Pay to the order of
Bank of America New York, N.Y.
for collection for my
account. Theron Wilson

(f)

which absolutely require protest when dishonored). Since protest of the note was not necessary we will assume that it was not made, reserving the subject of protest for later consideration.

The parties to the note under consideration, were now as follows:—

Charles Wilson, maker, not entitled to notice;

Henry Manning, maker (as surety) not entitled to notice;

Smith & Co., payees and indorsers, entitled to notice as indorsers;

Amos Markham, indorser, notice waived, therefore not required;

Henry Wise, indorser without recourse, notice unnecessary;
Ralph Lehr, indorser and guarantor, entitled to notice as indorser, but not as guarantor;
Theron Wilson, entitled to notice.

271. Collection.—We will now suppose that Theron Wilson pays back to the Bank of America the amount he has received from the bank upon the note, or that he permits the bank to charge the note against his account. Thereon Wilson may now recover the amount from Lehr, and Lehr, in turn, will recover from Markham. *Wise having indorsed without recourse cannot be held.*

Suppose, now, that Markham finds Smith & Co. insolvent. He must look to the makers. Upon investigation he finds that Charles Wilson is worthless, and that Manning is responsible. Upon examining his note he finds that it reads "Sixty days after date I promise to pay." This being the fact, the note, though made by two, may be enforced against either maker in a suit against him alone. The obligation is "joint and several." It is enforceable against both or against either of the parties to it, as the holder chooses. In effect it is the same as though it read "We or either of us promise to pay." Markham sues Manning. Manning defends against the note on the ground that the goods in payment for which it was given were inferior to the sample by which they were bought. At the trial Markham shows that he acquired the note in due course; that the instrument was complete and regular on its face; that he bought it before it was due, without notice of any defense against it, and that he took it in good faith and paid value for it. Under such a state of facts, Manning's defense will be of no avail. In that case Markham will recover judgment against Manning for the amount of the note and costs of suit. Manning will then pay the judgment and may, in turn, sue Charles Wilson the real maker.

272. The Surety.—For although Manning is a joint maker as to third parties, it must be remembered that, as between him elf and Charles Wilson, *he is only a surety*. He had no

interest in the original proceeds of the note, therefore he can recover judgment against Wilson for the whole amount of the note, and accumulated costs. If this judgment can be collected, Manning will be fully reimbursed. If it can not be collected, he must suffer the common loss incident to suretyship. As was said centuries ago, so to-day, "He that is surety shall smart for it."

CHAPTER XXIII.

NEGOTIABLE INSTRUMENTS.

273. When is an Instrument Negotiable.—To be fully and perfectly negotiable, an instrument must conform to the following requirements:—

(a) It must be in writing and signed by the maker or drawer, or by his lawfully authorized agent.

(b) It must contain an unconditional promise or order to pay a certain sum of *money*.

(c) It must be payable on demand or at a fixed or determinable future time.

(d) It must be payable to order or to bearer.

(e) If the instrument is a bill of exchange, the person on whom it is drawn must be specified.

(f) In some states (but not in those having the Negotiable Instruments Law) an obligation, to be strictly negotiable, must be payable at some bank named in the instrument.

Want of negotiability does not imply any lack of legality or want of transferability. A bill or note, although payable in property, or otherwise lacking negotiability, is transferable, and, if a valid contract, is enforceable. But an instrument wanting negotiability does not pass like money. The purchaser of it does not, in general, take any better title to it than was possessed by his transferor.

274. Signing.— All negotiable instruments must be signed by or in behalf of the person who becomes primarily liable for payment. A signature by initial, or by arbitrary marks, or by rubber stamp, will be sufficient if the intent of the maker or

drawer to create a valid instrument ~~can be shown~~. Persons who cannot write may sign by mark. This is usually done in the following form:—

Witness:	his
RICHARD ROE.	JOHN X DOE
	mark

the mark being made by person to be bound by the signature. It is usual to have signatures by mark witnessed by the signature of someone who can write

275. Payable in Money.—To be negotiable the instrument must be payable *in money*. The courts generally hold that this may be either the money of this country, or of a foreign country. A note payable in property other than money is not negotiable.

ILLUSTRATION.—B made a note in which he promised to pay C “\$1,000 in cotton.” The note was held non-negotiable.
Auerbach v. Prichett, 58 Ala., 451.

276. Variance Between Words and Figures.—If the amount of the instrument written in figures differs from the amount written in words, the words, and not the figures, control. But if there is no amount written in words, the figures control.

ILLUSTRATION.—A note in substantially the following form was held to be a note for \$147.70,—

\$147.70	INDIANAPOLIS, IND., Nov. 28, 1893.
Four months after date I promise to pay to the order of Michigan Mutual Life Insurance Company Dollars, and five per cent, etc. Value received.	
	(Signed) J. B. WITTY.
Witty v. Michigan Mutual Life Ins. Co., 123 Ind., 411.	

277. Time of Payment.—To be negotiable, the instrument must provide a time of maturity. The date of maturity is sufficiently certain if the instrument is payable “on demand,” or “upon the death of B,” or “on or before” a certain date.

278. Words of Negotiability.—To be negotiable, the instrument must contain words of negotiability. In general, these

words are "or order," or, "or bearer." An instrument payable to a certain person "or his assigns" is not negotiable. Checks payable to "cash" or to "bills payable," or to "sundries," are held to be payable to bearer and are negotiable.

279. Certainty as to Amount.—To be negotiable, the instrument must be a promise or order for the payment of a certain amount. The fact that it is payable, (a) with interest, or (b) by stated installments, or (c) by stated installments with a provision, that upon default in payment of any installment, or interest, the whole shall become due, or (d) with exchange, or (e) with costs of collection, or an attorney's fee, will not, in most states, render the instrument non-negotiable. In states having the Negotiable Instruments Law, such instruments *are* negotiable. The laws of other states are not in harmony on this point.

280. Additional Provisions.—If the instrument contains a promise to do something in addition to making payment of money, its negotiability will be thereby destroyed.

But under the Negotiable Instruments Law, and in most states, the negotiability of an instrument is not impaired by reason of the fact that the instrument contains a clause (a) authorizing the sale of collateral securities in case the instrument is not paid when due, or (b) authorizing confession of judgment against the maker in case of default, or (c) waiving the benefit of any law intended for the advantage or protection of the obligor, or (d) giving the holder an election to require something to be done in lieu of the payment of money. Negotiability is not impaired by reason of the fact that (a) the instrument is not dated, nor (b) because it fails to state the consideration or to state that it is given "for value received," nor (c) because it fails to state the place where it is drawn or the place where it is payable, nor (d) because it bears a seal, nor (e) because it specifies a particular kind of money in which payment is to be made.

Nor is the negotiability of a note impaired by the fact that it recites the consideration for which it was given.

ILLUSTRATION.—The following note was held negotiable, and collectible in the hands of a holder in due course, after failure of the consideration, which would have been a good defense had the instrument been non-negotiable:—
 “\$300.

CHICAGO, March 5, 1887.

On July 1st, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars for the privilege of a framed advertising sign, size ——— x ———, in one end of each of the 159 street cars of the North Chicago City Railway Co., for a term of three months from May 15, 1887.

(Signed) SIEGEL, COOPER & Co.”

Siegel v. Chicago Trust & Savings Bank, 131 Ill., 569.

281. Antedating and Postdating.—The negotiability of an instrument is not impaired by antedating or postdating it, provided this is not done with an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires title from the date of delivery.

282. Filling Up Blanks.—The Negotiable Instruments Law provides that: “Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks. When a maker or drawer signs a bill or note in blank in order that the paper may be converted into a negotiable instrument, his act operates as a *prima facie* authority to the person to whom he delivers the paper to fill up the paper for any amount.

In order that an instrument, delivered in incomplete form, may be enforced after completion against any person who becomes a party to it before its completion, it must be filled up *strictly in accordance with the authority given*, and within a reasonable time; but if any such instrument, after completion, is negotiated to a purchaser in due course the instrument will be enforceable in his hands regardless of the fact that it may have been filled up for a greater amount than was intended by the maker.

Thus if A signed a blank negotiable note and delivered it to B, with instruction to fill up the instrument for a sum not exceeding \$500; and if B afterwards wrongfully wrote his own

name in the note as payee thereof, and inserted \$5,000 as the amount of the obligation, and then negotiated it in due course to C, A would be bound to pay C \$5,000.

When a maker of an instrument carelessly leaves space in a printed form whereby an alteration may be made without defacing the instrument or exciting the suspicions of a careful person, the maker will be liable upon the instrument to a holder in due course when the opportunity for alteration has been exercised. (See Sec. 15.)

283. Negotiation.—An instrument is “negotiated” when it is transferred from one person to another in such a manner as to confer ownership and possession upon the transferee. A note or bill payable to bearer, is transferred by merely delivering it to the transferee. A bill or note payable to order, and indorsed without naming any transferee is, after such indorsement, payable to bearer. Thus, if A, being the payee named in a bill or note payable to his order, indorsed the instrument by writing his name across the back of it without naming any transferee, the instrument is transferable by mere delivery, until it is again indorsed in full.

284. Parties.—The parties to a bill or note are either Original or Subsequent. The Original parties are those whose names appear upon it at the time of its inception. All others are Subsequent parties. Thus the original parties to a bill are the drawer, drawee and payee. The original parties to a note are the maker and the payee. In states having the Negotiable Instruments Law, persons other than the payee who write their names upon the back of the instrument before it has been originally issued are called Irregular Indorsers, and have the same rights as other indorsers. In some other states such indorsers are treated as joint makers. When joint makers, they are not entitled to notice of dishonor.

285. Liabilities of Drawer.—The drawer of a bill is continuously liable to the holder for the amount, provided the payee, or other holder, uses due diligence in presenting the

bill for acceptance and for payment, and in the event of non-acceptance or non-payment gives the drawer lawful notice of that fact. In general, negligence in presentment for acceptance, or in presentment for payment, or failure to give notice of non-acceptance or non-payment releases the drawer, unless he has waived these rights.

If, however, the drawer had no reasonable expectation that his draft would be honored, as where one draws on a bank in which he has no funds; or if he draws on himself, or upon a partnership in which he is a member; or if he draws upon a fictitious person, or upon one wanting in capacity to contract—in all these cases, the drawer remains liable upon the instrument and it may be enforced against him, whether presentment has, or has not, been made, and whether he has, or has not, been given notice of dishonor.

ILLUSTRATION.—Culver drew three checks aggregating \$2,500 upon the First National Bank, LaFayette, Ind., in favor of Marks, as payee. Culver had no funds in the bank and Marks did not present the checks for payment, nor did he give notice of non-payment to Culver. The court held that, because Culver had no funds on deposit, presentment and notice of non-payment were unnecessary, and that Culver remained liable to Marks for the amount.

Culver v. Marks, 122 Ind., 554.

286. Liability of Drawee.—The drawee has no *liability* upon a bill until he accepts it. But by acceptance his liability becomes fixed, and he is bound for payment of the obligation. After general acceptance, his liability is the same as that of the maker of a promissory note. *The drawee must know the signature of his drawer.* If he accepts a bill to which the drawer's signature has been forged, he can not thereafter repudiate the bill, or recover back, from a holder in due course, money paid upon it.

287. Liability of Maker and Acceptor.—The maker of a note and the acceptor of a bill have an identical liability, which *is to pay the obligation at maturity.* Neither demand nor notice *is* necessary to fix this liability. It arises by absolute contract.

288. Liability of Payee.—The payee incurs no liability upon a bill or note until he negotiates it. If he indorses it, his liability becomes the same as that of any other indorser. If the paper is payable to bearer and the payee transfers it by mere delivery, his liability is the same as that of any other holder who transfers by delivery.

289. Liability of Holders who Transfer by Delivery.—One who transfers by delivery a bill or note payable to bearer *is not without liability*. Certain warranties arise from the mere fact of transfer. The person who transfers paper by delivery warrants to his transferee,

- (a) That the instrument is genuine and in all respects what it purports to be;
- (b) That he has a good title to it;
- (c) That all prior parties had capacity to contract;
- (d) That he has no knowledge of any fact that would impair the validity of the instrument or make it valueless.

290. Liability of General Indorsers.—*Every indorser* who does not qualify his indorsement, warrants to all subsequent holders in due course,

- (a) That the instrument is genuine and in all respects what it purports to be;
- (b) That he has good title to it;
- (c) That all prior parties had capacity to contract;
- (d) That the instrument is, at the time of his indorsement, valid and subsisting;

(e) And he further engages that, on due presentment, it shall be accepted or paid, or both, according to its requirements, and that, if it is dishonored, *and the necessary proceedings on dishonor are duly taken*, he will pay the amount of the instrument to the holder, or to any subsequent indorser who may be compelled to pay it.

291. Forms of Indorsement.—Indorsement of a bill or note may be either special or in blank. An indorsement is special when it names a person as indorsee. An indorsement is in blank when it does not name a person as indorsee.

ILLUSTRATION.—ENDORSEMENT IN BLANK.

RICHARD ROE.

SPECIAL INDORSEMENT.

Pay to the order of John Doe.

(Signed) RICHARD ROE.

An indorsement may also be restrictive, qualified or conditional. It is restrictive when (a) it prohibits the further negotiation of the instrument, or when (b) it constitutes the indorsee, the agent or trustee of the indorser.

ILLUSTRATION.—RESTRICTIVE INDORSEMENTS.

Pay to John Doe only.

(Signed) RICHARD ROE.

Pay to the order of John Doe for collection for my account.

(Signed) RICHARD ROE.

An indorsement is qualified when it diminishes the liability which the indorser would otherwise incur.

ILLUSTRATION.—QUALIFIED INDORSEMENT.

Without recourse.

(Signed) RICHARD ROE.

Pay to the order of John Doe without recourse on me.

(Signed) RICHARD ROE.

An indorsement is conditional when it names some state of fact as a condition precedent to payment.

ILLUSTRATION.—CONDITIONAL INDORSEMENT.

Pay to the order of John Doe upon completion of the Merchants Savings Bank building now under construction.

(Signed) RICHARD ROE.

When an indorsement is conditional, the drawee may ignore the condition and make payment as though no condition had been imposed. No liability attaches for so doing, but a holder, who receives payment in violation of a condition named in an indorsement, will hold the proceeds subject to the rights of the person who indorsed conditionally.

292. Liability of one who Indorses "Without Recourse."

—It is popularly supposed that one who indorses "without recourse" has no further liability upon the paper. This is true so far as his liability as an indorser is concerned. He cannot be held for payment upon his indorsement. But, nevertheless, he is not wholly free from all responsibility. He is bound to his transferee upon the same implied warranties that arise in the case of one who transfers paper by delivery.

293. Dishonor.—A bill is dishonored by non-acceptance,

(a) When it is duly presented for acceptance and acceptance is refused or cannot be obtained; or

(b) When presentment for acceptance is excused and the bill note is overdue and unpaid.

294. When Presentment for Acceptance Must be Made.

—Presentment for acceptance *must be made*,

(a) When the bill is payable after sight, or in any other case where presentment for acceptance is necessary to fix the maturity of the instrument.

A few states still allow three days' grace upon paper payable at sight. Still fewer allow three days' grace upon paper payable upon demand. In such states, a bill payable "at sight" must be promptly presented for acceptance, so that the date of maturity, which falls on the third day thereafter, may be fixed. For the same reason in states allowing grace on demand paper, a draft payable "on demand" must be presented for acceptance. Grace is now abolished in all states which have adopted the Negotiable Instruments Law, and in many others.

(b) Where the bill expressly stipulates that it shall be presented for acceptance; or

(c) Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary.

295. When Presentment for Acceptance is Excused.—

Presentment for acceptance is excused, and a bill may be treated

as dishonored by non-acceptance in either of the following cases:—

(a) Where the drawee is dead or has absconded, or is a fictitious person, or a person not having capacity to contract.

(b) Where, after the exercise of reasonable diligence, presentment cannot be made;

(c) Where, although presentment has been irregular, acceptance has been refused for some reason other than the irregularity of presentment.

(d) Where the holder of a bill drawn payable elsewhere than at the residence or place of business of the drawee has not reasonable time in which to make presentment for acceptance before the bill falls due.

296. How Presentment for Acceptance is Made.—Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour on a business day, and before the bill is overdue, *to the drawee* or to some person authorized to accept or refuse acceptance on his behalf.

When a bill is drawn upon two or more persons not partners, presentment must be made to each, unless one has authority to accept for all.

297. Acceptance.—Acceptance should be made by the drawee writing the word “Accepted” across the bill and signing his name, thus:—

Accepted,
RICHARD ROE.

The acceptance may be dated, but it need not be.

By consent of the holder, acceptance may be made upon a separate paper. This does not bind the acceptor, except in favor of the holder and of persons to whom it is shown and who give value for the bill on the strength of such acceptance. Acceptance upon a separate paper is sometimes taken for the purpose of avoiding delay. Acceptance may be made by letter or by telegram. (See Sec. 37). An unconditional written promise to accept a bill is deemed an actual acceptance in favor of every person who, in reliance thereupon, receives the bill for value.

An acceptance, to be sufficient, must not express that the drawee will pay in anything other than money.

298. Time for Acceptance.—The drawee may take twenty-four hours in which to decide whether he will or will not accept the bill. Acceptance, when made, dates as of the day of presentment. Thus a bill payable ten days after sight (which means 10 days after presentment), presented June 10th, and accepted June 11th, would fall due June 20th, not June 21st.

If a drawee to whom a bill is delivered for acceptance destroys it, or refuses within twenty-four hours (or within such other period as the holder may allow) to return the bill, he will be deemed to have accepted it.

299. Kinds of Acceptance.—Acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance is one which varies from the intent of the bill as drawn.

300. General Acceptance.—All parties to the bill prior to acceptance are entitled to have the bill accepted without qualification. If a qualified acceptance is offered, the holder may refuse to take it and may treat the bill as dishonored unless general acceptance is given.

301. Qualified Acceptance.—When a qualified acceptance is taken, the drawer and indorsers cease to be liable on the bill, unless they give, or have given, express or implied consent.

An acceptance is *qualified* in the following cases:—

(a) When payment is contingent upon fulfillment of a condition:

“Accepted, payable when goods consigned to me have been sold.”

RICHARD ROE.

(b) When acceptance is for only a part of the amount of the bill;

"Accepted, to be paid half in money and half in goods."

RICHARD ROE.

"Accepted as to \$500," upon bill of \$635."

RICHARD ROE.

(c) When an acceptance limits payment to one place only:—

"Accepted, payable at First National Bank of Chicago only."

RICHARD ROE.

An acceptance, naming place of payment, but not excluding other places of payment is *general* and unqualified. A bill thus accepted cannot be treated as dishonored:—

"Accepted, payable at First National Bank of Chicago."

(d) When time of payment is qualified;

"Accepted on condition of renewal if not able to pay at maturity."

(e) When less than all drawees accept.

A bill drawn on a partnership after dissolution and accepted by one of the former members of the firm, but not by the others, is qualifiedly accepted. Such acceptance binds the person accepting, but not the person who does not accept.

302. Acceptance for Honor.—With the consent of the holder, a stranger to the bill may accept it *supra protest* (i. e. after protest) for the benefit of any party liable upon it. This is done to strengthen the credit of the paper, thereby protecting an obligor against the harmful consequences which might result from the instrument's dishonor. The acceptor for honor lends his credit to the bill. He is liable to the holder and to all parties subsequent to the one for whose benefit he accepts. The form of an acceptance for honor is as follows:—

Accepted *supra protest* for honor of John Doe.

RICHARD ROE.

303. Necessity of Presentment for Payment.—Presentment for payment is not necessary to bind the maker of a note or the acceptor of a bill. These parties are bound by their signatures alone, and no further act is required to charge them with liability. If the instrument is payable at a specified place, for example at some bank, the liability of the maker or acceptor is not changed by the fact that presentment for payment is not made at such place. The only consequences of neglect to make presentment for payment at the place named in the instrument are (1) If the maker or acceptor was ready and able to make payment at that place at the time of maturity, further interest and costs of suit cannot be recovered from him in case suit is brought without such presentment. Ability and readiness to pay at the time and place of maturity is equivalent to a tender. (2) If damage to the maker or acceptor has resulted from the holder's failure to make presentment at the time and place specified in the bill or note, such damage may be set off in reduction of the amount due upon the instrument.

Presentment for payment is necessary to bind the drawers and indorsers of a bill. It is equally necessary to bind the indorsers upon a note. In other words, failure to present a negotiable instrument for payment at maturity, discharges the drawers of a bill, and the indorsers of a bill or note, from further liability. This is the general rule. It is subject to the following exceptions:—

(a) Presentment for payment is not required in order to charge a drawer when he has no right to expect or require the drawee or acceptor to pay the bill.

Thus, presentment of a check drawn upon a bank in which the drawer has no funds and no credit, is unnecessary.

(b) Presentment for payment is not required in order to charge an indorser when the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented. The reason for this is that such indorser is really the party finally liable on the paper.

ILLUSTRATION.—As an accommodation, A issued his note for \$100 payable to the order of B. B indorsed and discounted the paper

and used the proceeds. A received no consideration for the instrument. In such case B would not be entitled to notice of non-payment because he is not entitled to indemnity from A. B himself is the person finally liable for payment.

(c) Presentment for payment is excused when, after the exercise of reasonable diligence, presentment cannot be made.

(d) Presentment for payment need not be made when the drawee is a fictitious person.

(e) Presentment for payment need not be made when presentment has been expressly or impliedly waived.

304. Waiver.—A waiver written or printed above the signature of an indorser binds such indorser only, and does not apply to prior or subsequent indorsers. But if the waiver is embodied in the bill or note itself, it binds *all* parties to the instrument.

Under the Negotiable Instruments Law the words “protest waived” written or printed on the face of a bill waive all formalities otherwise needful to charge the drawers and indorsers.

The same words written or printed on the face of a note, waive all formalities otherwise needful to charge the indorsers.

The same words written or printed above the signature of the indorser of a bill or note, waive all formalities otherwise needful to charge such indorser.

In states where the Negotiable Instruments Law is not in force, every step waived should be mentioned in the waiver.

In states in which the Negotiable Instruments Law is in force, the words “protest waived.”

(a) Waive presentment for acceptance (if a bill);

(b) Waive protest for non-acceptance (if a bill);

(c) Waive notice of dishonor by non-acceptance (if a bill);

(d) Waive presentment for payment (as to all negotiable instruments);

(e) Waive protest for non-payment (if a foreign bill);

(f) Waive notice of dishonor by non-payment (as to all negotiable instruments).

It will be remembered that drawers and indorsers are entitled to protest of foreign bills (but not to protest of notes and inland bills) unless this right is waived.

A waiver of notice of dishonor is not a waiver of presentment and protest. All rights not waived remain in force.

305. Implied Waiver.—If a drawer or indorser who has been discharged from liability by want of presentment, protest or notice of dishonor, afterwards promises payment, he will be held to have waived the omitted formalities, and cannot escape liability by reason of the such omissions.

Waiver may also be implied from the indorser's conduct prior to maturity.

ILLUSTRATION.—McDaniel gave his note to Markland, Dodge & Moore, who indorsed it for purposes of negotiation. Before the note fell due, Dodge, a member of the firm of Markland, Dodge & Moore requested the holder of the note not to protest it for non-payment at maturity, promising to see that it was paid and that the holder should not lose a dollar. Held, that this amounted to a waiver of the right to demand, notice and protest.

Markland, Dodge & Moore v. McDaniel, 51 Kan., 350.

306. Presentment for Payment.—

(a) Presentment must be made by the holder or someone authorized to receive payment in his behalf;

(b) Presentment must be made at a reasonable hour of a business day. To be reasonable, the hour must be one in which it is customary to transact business at the place of presentment. Thus, if the instrument is payable at a bank, presentment there must be made during banking hours.

(c) Presentment must be made at a proper place, namely, at the place of payment specified in the instrument.

If no place of payment is specified, but the address of the person to make payment is given in the instrument, then at that place;

If no place of payment or address of the payor appears in the instrument, then at the usual place of business or residence of the person to make payment. Presentment at such place of business during business hours will be sufficient, even though there is no person present having authority to pay.

When none of the foregoing provisions for presentment are available, then presentment may be made wherever the party to make payment can be found, or at his last known place of business or residence.

(d) Presentment must be made to the person primarily liable, or if he is absent or inaccessible, to *any person* found at the place where presentment is to be made.

307. Instrument Must be Shown.— The instrument must be exhibited to the person from whom payment is demanded, so that he may have an opportunity to see that it is genuine, and to determine its amount and the right of the holder to receive payment. When the instrument is paid, it must be delivered up to the person paying it.

If the original instrument is lost, presentment of a copy with an offer of indemnity will be sufficient.

308. Protest.— A foreign bill of exchange, when dishonored by non-acceptance or non-payment *must be protested*, or the drawers and indorsers will be discharged of further liability. Dishonored notes and inland bills may be, and, in practise are protested, but failure to protest them will not relieve the drawers and indorsers. Protest of notes and inland bills is therefore, not a legal necessity. It is resorted to as a matter of uniformity and convenience.

The student must remember that protest for dishonor and notice of dishonor are separate and different things.

A Protest (or Certificate of Protest, as it is often termed) is a written statement made by a Notary Public under his seal of office and attached to the bill or note, for the purpose of furnishing every subsequent holder a means of readily proving that the instrument has been presented and dishonored. It is no part of the Notary's duty to give the drawers and indorsers notice of dishonor. This is a separate task which devolves upon the holder. In actual practise, the Notary often performs this service, but in so doing he acts unofficially and merely as the holder's agent.

A protest may be made by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. Such protest should be the same in substance as a protest made by a Notary. This method of protest is useful when a Notary is not available.

309. Contents of Certificate of Protest.—The protest must set forth

- (a) The time and place of presentment;
- (b) The fact that presentment was made and the manner thereof;
- (c) The cause or reason for protesting the bill;
- (d) The demand made and the answer given, if any, or the fact that the drawer or acceptor could not be found.

The protest should be made on the day of dishonor.

310. Summary of Omissions Which Discharge Drawers and Indorsers.—In dealing with negotiable instruments, constant care must be exercised to prevent the premature release of drawers and indorsers. When the formality is not waived or otherwise excused, drawers and indorsers of a *foreign* bill are discharged,

(a) By failure to present the instrument for acceptance, if acceptance is required;

(b) By failure to protest for non-acceptance, when required;

(c) By failure to give notice of dishonor by non-acceptance when required;

(d) By failure to make presentment for payment at maturity;

(e) By failure to make protest for dishonor by non-payment;

(f) By failure to give notice of dishonor by non-payment.

When the formality is not waived or otherwise excused, drawers and indorsers of an inland bill are discharged,

(a) By failure to present the instrument for acceptance if acceptance is required;

(b) By failure to give notice of dishonor by non-acceptance when required;

(c) By failure to make presentment for payment at maturity;

(d) By failure to give notice of dishonor by non-payment at maturity.

When the formality is not waived or otherwise excused, indorsers of a *note* are discharged,

(a) By failure to make presentment for payment at maturity;

(b) By failure to give notice of dishonor by non-payment.

311. Sureties.—One who signs his name upon the face of a note, having no pecuniary interest therein, is a surety. As to third persons he is a joint maker. He is not released by failure to make presentment for payment, nor is he entitled to notice of non-payment.

312. Guarantors.—We occasionally find negotiable paper bearing upon its reverse side a written undertaking to this effect;

For value received I hereby guaranty payment at maturity of the within obligation.

JOHN DOE.

This is not an indorsement. It is a guaranty. The guarantor is not entitled to notice of dishonor in the sense that an indorser is. Want of notice does not, standing alone, discharge him. Yet he should be given notice of dishonor with reasonable promptness, for otherwise, if he suffers damage by want of notice, he will be discharged to the extent of the damage sustained.

Any extension of the obligation or other change therein, made without the guarantor's consent, discharges him from further liability.

313. Material Alteration.—A holder in due course of a materially altered instrument may enforce it according to its original terms, provided he is not a party to the alteration.

States in which the Negotiable Instruments Law is not in force, generally hold a materially altered instrument void even in the hands of a holder in due course. Such states treat the altered instrument as a forgery.

314. Forgery of Signature.—An instrument bearing a forged signature is void in the hands of all holders.

315. Usury.—Usury is unlawful interest. For taking usury different states attach different penalties. In some, the interest in excess of the legal rate is forfeited. In others, all interest is forfeited. In a few, both principal and interest are forfeited. In many states there is no limit to the rate of interest that may be lawfully charged. (See Appendix, Table C.)

316. Bonuses.—If a lender of money or one acting as his agent receives, in addition to the legal rate of interest, a bonus, which, added to the interest reserved, makes a total in excess of the highest legal rate, the transaction is usurious. But such a bonus may be legally paid by the borrower to his own agent for procuring the loan. On the first proposition the courts are not in harmony; as to the last, there is no conflict of opinion.

ILLUSTRATION.—Keaton applied to Smith, a broker, to procure a loan. Smith took Keaton's note for \$300 and turned it over to the money loaner, Vahlberg, his principal, who paid Smith therefor \$300, less the highest legal rate of interest. Smith, in turn, paid Keaton \$261, keeping the difference to cover cost of drafting, recording, and his bonus. Held, usurious.

Vahlberg v. Keaton, 51 Ark., 534.

317. Payment of Interest in Advance.—It is not usury to collect the highest legal rate *at the time of making the loan*. In other words, the interest agreed upon, even though it be the highest rate, may be deducted from the amount turned over by the lender to the borrower at the time of making the advance.

REVIEW QUESTIONS

1. How many kinds of banks? Name and define each.
2. Tell when, under varying conditions, a check should be presented for payment?
3. What is a depositor's duty regarding returned checks?
4. Give briefly, the duties of the following bank officers: President, Vice-President, Cashier, Teller. From whom do all these receive their authority?
5. Who are the stockholders of the bank? What authority have they?
- I-11 46. Draw up a draft corresponding with the following memorandum: H. Doane & Co., of Chicago, having sold goods in the amount of \$5000.00 George Lucore & Co., upon the latter's agreement to accept their draft drawn payable ten days after sight, the following instrument:
 - (a) Name and define the parties to the preceding bill of exchange.
 - (b) On a form purporting to be the back of the preceding bill of exchange, show, in proper form, an indorsement in full to the Chicago City Bank, Chicago, Ill.
 - (c) Next show indorsement by the Chicago City Bank to the Merchants Bank, Englewood, Ill., for collection.
 - (d) Upon presentment for payment by the holder of this instrument, the bill was dishonored. Explain fully what this means. Who is the present holder?
7. (a) Charles W. Nelson, Chicago, bought of James Russo, New York, goods to the value of \$3000.00, for which the vendee made payment by delivering to the vendor at 7%, 30-day negotiable note, payable at the Chemical Nat'l Bank, New York, and secured by Peter J. Davis, as surety.
 - (b) Show the above indorsement upon a form representing the back of the note.
 - (c) Write out this note complete. Upon receiving this note the vendor indorsed it in blank. Show indorsement.

The note, thus indorsed, passed into circulation and was transferred without further indorsement, through the hands of several parties until it finally came into the possession of Andrew Miller. Andrew Miller, being a prudent and thoughtful man, and knowing that the above note was liable to be cashed by anyone, in case it should become lost, wrote in the necessary wording to make the blank indorsement an indorsement in full.

 - (d) Show on the back of the note the indorsement as Mr.

Miller caused it to read. Mr. Miller then indorsed the note to Frank Jezek, waiving protest and notice.

- (e) Show this indorsement.
- (f) Had Mr. Miller a right to do this?
- (g) Why?
- (h) Was it any advantage to Mr. Miller, and, if so, what?
- (i) Was it any advantage to Mr. Jezek, and, if so, what?

Mr. Jezek then indorsed the note to Joseph May in such a way as to assume the least possible liability.

- (j) What kind of indorsement was this?
- (k) Show on the back of the note how it looked.

Mr. May now indorsed this same note to Niels Madsen in a manner whereby he (Mr. May) agrees to warrant payment of same.

- (l) What sort of indorsement is this called?
- (m) Illustrate it on the back of the note.

8. How many original parties to this note? Name them.

9. How many subsequent parties to this note? Name them.

10. When is an instrument negotiable?

11. When is an instrument said to be negotiated?

12. Name seven points of liability of the drawer of a bill of exchange or draft.

13. Name two points of liability of the drawee of a bill of exchange or draft.

14. Give the warrants made by a general indorser.

15. Name five different forms of indorsement.

16. To whom, when, where, and how must presentment for acceptance be made?

17. Illustrate the form of an acceptance for honor.

18. Give a summary of omissions which discharge drawers and indorsers.

19. What must be set forth in a certificate of protest?

20. By whom may protest be made?

21. In states in which the Negotiable Instruments Law is not in force, what is the effect of a materially altered instrument in the hands of a holder in due course?

22. What is the law regarding the value of an instrument bearing a forged signature?

23. (a) What is usury?

(b) How are the penalties therefor determined?

24. (a) Define "Bonus".

(b) Is it considered usury to collect the highest legal rate of interest at the time of making the loan,—that is, in advance?

PROBLEMS

1. A bank refuses through error, to honor A's check for \$300, when A has this amount on deposit. Is the bank liable to A for damages? *Yes*

2. On January 20 J gave O a check as payment in full of account. February 2 the bank on which the check was drawn failed. Who loses the amount of the check, O having failed to present it for payment? (The bank is in the same town as J and O.) *O*

3. In the above case, suppose the bank failed January 21. Who bears the loss? *J*

4. A writes a bank asking if B's check for \$1000 is good. The bank replies: "B is all right. Present your check." If B does not have \$1000 on deposit, can the bank be held for that amount? *Yes*

5. A gives B a certified check. Before the check can be presented for payment the bank fails. Who is liable? *A*

6. A gives B a check. B takes the check to the bank and has it certified, but does not demand payment. Later the bank fails. Who is liable? *no one*

7. A bank pays a check bearing A's forged signature. B, the payee, is a bona fide holder. Can the bank recover from B? *No*

8. A bank pays a raised check bearing A's signature. B, the payee, is a bona fide holder. Can the bank recover from B? *No*

9. H discovers that the bank paid out a year ago \$100 on a check bearing H's forged signature. H's paid checks and balanced pass book have been returned to him monthly. Who must lose? *H*

10. E deposited \$876 with the Peoples State Bank, to be paid to W on presentation of a deed and abstract to two city lots. The bank failed. What recourse does E have? *W, H is entitled to be paid*

11. The cashier of the Valley National Bank, without special authority, gave B a letter authorizing B to receive a package of money from the First State Bank. B disappeared with the money. Is the Valley National liable to the First State Bank? *No*

12. A bank fails because of embezzlement by the cashier. The directors have accepted the weekly reports of the cashier without investigating further. Are the directors liable to the depositors for the loss? *No*

13. A delivered a note to a bank in Battle Creek, Mich., for collection from B at Des Moines, Iowa. The Battle Creek bank sent the note to its correspondent bank at Des Moines. The Des Moines bank collected the note and kept the money. Who is liable to A? *A*

14. A note for \$5000, given by a responsible person, was sold for \$10. Is the purchaser a holder in due course? *No*

15. Jones gives a note promising to pay Smith \$500 in corn. Is the note negotiable? *No*

16. A note in the following form is legally a note for how much money? *700*

BATTLE CREEK, MICH., Feb. 1, 1915

One year after date I promise to pay to

W. B. Phillips or order **\$** 1000

One Hundred ~~~~~ **DOLLARS**

with interest at six per cent, for value received.

(Signed) M. O. Carson

17. A signed a blank negotiable note and handed the note to B with instruction to complete the note for a sum not to exceed \$1000. B inserted his own name as payee, and made the face of the note \$10,000, afterward negotiating the note to C. Is A liable to C? For how much? *Yes to \$10,000*

18. A drew a check for \$1000 on a bank, B, in favor of C. A had no funds in the bank. C did not present the check for payment, nor did he give notice of non-payment to A. Is A liable to C? *Yes*

19. A note is payable to M or order. It is transferred to N without indorsement. Can N collect? *No*

20. I, J. W., promise to pay to the order of C. F., one thousand dollars on January first. Is this a promissory note? *Yes*

21. A secures a loan through B, a broker, paying the highest legal rate of interest, and in addition giving B a bonus for securing the loan. May this bonus be legally paid?

22.

BATTLE CREEK, MICH., Jan. 1, 1916

DUE John Smith **\$** 500.00

Five Hundred ~~~~~ **Dollars**

Value received.

(Signed) Elmer Hosmer

Is the above a promissory note?

23. A gave B a promissory note for \$1000. B indorsed the note in the following form: *I assign over to C the sum of \$700, as part of this note.* Afterward he made another indorsement and assigned the balance of the note to C. Was the indorsement legal? *yes*

24. A holds B's note for \$5000, due January 1, 1915. At 11:30 o'clock P. M., January 1, the note is presented for payment. Is the demand sufficient?

25.

BATTLE CREEK, MICH., March 15, 191 6

For value received, _____ we _____ promise to pay

J. B. Stone _____ or order **\$** 5000.00

Five Thousand _____ **DOLLARS**

six months _____ after date, with interest at eight per cent.

(Signed) C. D. Hoon

J. P. Peterson

Suit is brought against Hoon and Peterson on the above note. Peterson establishes, that without his knowledge or consent "I" had been changed to "we" and the words, "with interest at 8 per cent" added. Is Peterson liable? *yes*

26. A gives a note, payable to B or bearer on or before two years after date. B sells the note to C. Six months after the note is drawn A pays C in full, but fails to take up the note. Later, C sells the note to D. Is A liable to D? *yes*

27. A gives his check for \$100 to B. B indorses it to C. C raises the check to \$1000. The bank pays C the \$1000. Can the bank recover from C. If so, how much? *yes*

28. A gives B his check, payable to B or bearer. B loses the check. Can B stop payment by notifying the bank? *yes*

29. B holds A's note, payable at the National Bank of Commerce. At maturity B presents the note there for payment. Can the bank pay it and deduct the amount from A's account? *no*

30.

DES MOINES, IOWA, May 1, 1916

DUE Jessie Wilson, widow, 

Five Thousand  **Dollars**

to be paid as called for, for her support.

(Signed) Clarence Adams

Is the above a promissory note?

no

31. A note was indorsed, "Pay to the order of....."

C. W. Simmons." *no*

Simmons sent the note to his brother, who gave it as security for a loan. Is Simmons liable to the holder?

32. A check payable to bearer is lost. The finder pays it to a merchant for supplies. Is the real owner liable to the merchant?

33. A gives B a note for a gambling debt. B indorses the note to C. Is A liable to C? *no*

Loans, Credits and Collections.

SECURITIES,
METHODS OF COLLECTION.

CHAPTER XXIV.

LOANS, CREDITS AND COLLECTIONS.

318. Loans.—Persons, firms and corporations, both in prosperity and in adversity, often find the fluctuating demands of business such that additional capital is required. Sometimes this capital is obtained by selling an interest in the business, but more frequently the needed money is procured by negotiating a loan. From the borrower's standpoint, it is important to arrange for the lowest obtainable interest rate and for adequate time in which to make payment. The lender's chief care should be the sufficiency of the security taken.

319. Security.—Securities are of many kinds. They may consist of personal undertakings, as suretyships, indorsements, indemnity bonds and guaranties, or they may be in the nature of property, real or personal, mortgaged or pledged to secure repayment.

320. Suretyship.—Suretyship is an undertaking to answer for the debt or default of another. The surety is bound to the promises as fully as the principal promisor. If the surety is obliged to pay, he has a right to full reimbursement from his principal. If the principal debtor proves worthless, the surety is without remedy and hence must bear the whole loss. Of course, if both surety and principal prove worthless, the loss will fall upon the lender.

321. Indorsement.—As before stated, the chief obligation of an indorser is conditional. It is that, if the persons already liable on the instrument refuse to pay it, *he will*, provided

proper presentment (and protest, if a foreign bill) is made, and provided legal notice of dishonor is given to him. The indorser may waive any right to which he is entitled.

If an indorser makes payment of the obligation, he is entitled to full reimbursement from any discharged party who precedes him upon the obligation.

Joint indorsers can recover from each other proportionately only. That is to say, if several persons agree among themselves to join in indorsing paper, each to be liable for his proportion only, they can enforce the agreement as among themselves. As to third persons, they are each individually liable for the whole amount. But one of their number who has paid the whole amount can enforce only proportionate contribution from his co-indorsers. Thus, if three persons agree to indorse jointly and one of them pays the whole debt, he is entitled to a contribution of one third each from the other two joint indorsers.

322. Indemnity Bonds.—Indemnity Bonds express a suretyship undertaking, and this suretyship may be for the payment of money or for the performance of any other obligation. Indemnity bonds are to be distinguished from money bonds, the latter being, in general, a direct and unconditional principal promise to pay money.

323. Guaranties.—A Guaranty is a collateral undertaking to pay the debt of another in case he does not pay it. To be valid, it must be in writing, signed by the guarantor. It may be in the form of a letter or telegram. If a guaranty is given as an inducement to the granting of credit, the credit granted will be a sufficient consideration to support it. But if it is given after the credit has been granted, there must be a distinct consideration given to support it. This consideration may consist in a renewal of a note, or in an extension of time of payment granted to the person whose obligation is guaranteed. Or it may consist in a forbearance on the part of the promisor. Thus if A were about to sue B upon a matured claim, and if C were to agree with A that if

A would refrain from suing, he, C, would guaranty payment of the claim, A's forbearance would be a sufficient consideration to support the guaranty.

A guaranty is to be construed according to what appears to have been the intent of the parties, without strict, technical nicety. If the intent appears to have been that the guaranty was to extend to a series of transactions, it will be so construed by the courts.

ILLUSTRATION.—The following guaranty was held to continue until revoked.

"Sir: You can let J. L. Day have what goods he calls for, and I will see that the same are settled for."

Hotchkiss v. Barnes, 34 Conn., 27.

When the guaranty is for the performance of a contract, the guarantor is entitled to have the contract stand *unchanged*. If a change of terms is made without his consent (as, for example, by granting an extension of time), he is discharged.

So, too, a guarantor is entitled to the benefit of all security held by the promisee. If the guarantor pays the obligation, he is entitled to have such security delivered over to him. If the promisee releases any collateral security by him held, the guarantor is thereby discharged.

ILLUSTRATION.—The First National Bank of Paw Paw loaned The Cleveland Bay Horse Co. \$4,000 on its note, guaranteed by Walker and others. Two notes of \$500 each, signed by Lange and Porter as joint makers, were taken by the bank from the Horse Co. as collateral to the \$4,000 loaned. Afterwards, the bank permitted two notes of \$500 each, signed by *Lange alone* to be substituted for the collateral notes signed by Lange and Porter, thereby releasing Porter. This was done without the consent of the guarantors. The court held that the guarantors were released by this reduction of the collateral security.

National Bank v. Walker, 115 Mich., 434.

When a guarantor has paid the guaranteed obligation, he is entitled to recover *pro rata* from his joint guarantors, if any there are, or *in toto* from the principal debtor.

324. Mortgages.—A mortgage is a conveyance of property as collateral to secure the payment of a debt or the performance of an obligation. The maker of a mortgage is a

"mortgagor." The person to whom the mortgage is made is a "mortgagee." Mortgages are of three general classes: (a) Real Estate Mortgages, (b) Chattel Mortgages, and (c) Dual Mortgages, covering both chattels and real estate.

325. Real Estate Mortgages.—Mortgages of real estate are those which create a lien upon land. They must be in writing, and should always be acknowledged and recorded. In some states two subscribing witnesses are required. Mortgages generally take priority in the order in which they are recorded. Thus, the mortgage first recorded must be first satisfied out of the estate in case of foreclosure. The mortgages recorded last would, in case of foreclosure, receive only the remaining surplus after all mortgages recorded earlier had been paid in the order of their record. The reason for this rule is that all persons are entitled to rely upon the public records as true; all persons are entitled to believe that all transfers and incumbrances affecting the title appear upon these records. In this the law protects them. Those whose forebearance, negligence or fraud has suffered instruments affecting title to remain unrecorded must suffer the consequences.

But "when the reason fails the rule fails." If a mortgagee takes his mortgage with knowledge of an existing, unrecorded mortgage, he takes subject thereto, and he cannot gain priority by recording his mortgage first.

326. Form of Real Estate Mortgage.—While nearly every state, by custom or by statute, uses forms in some respects differing from those in other jurisdictions, the following will give the student an idea of the terms and clauses usually appearing in a simple mortgage of real estate. When mortgages are intended to secure large and varied interests, as, for example, a bond issue by a great corporation, voluminous instruments are required to fully anticipate and provide for all contingencies.

REAL ESTATE MORTGAGE.

THIS INDENTURE, Made this first day of May, A. D. 1906, between Hiram Smith (unmarried) of Grand Rapids, Kent County,

Michigan, as party of the first part, and Joseph Dane, of the same place, as party of the second part,

WITNESSETH, That the said party of the first part, for and in consideration of the sum of five hundred (\$500) dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, released enfeoffed and confirmed, and by these presents does grant, bargain, sell, remise, release, enfeoff and confirm unto the said party of the second part, and to his heirs and assigns, FOREVER, all that certain piece or parcel of land situate in the township of Bedford, in the County of Calhoun and State of Michigan, and described as follows, to wit:

Lot numbered one (1) in Eldredge Addition to Urbandale, as appears by the recorded plat thereof,

Together with the hereditaments and appurtenances thereunto belonging or in anywise appertaining; TO HAVE AND TO HOLD the above bargained premises unto the said party of the second part, and to his heirs and assigns, to the sole and only proper use, benefit and behoof of the said party of the second part, his heirs and assigns, FOREVER.

Provided Always, and these presents are upon this Express Condition that if the said party of the first part shall and do well and truly pay, or cause to be paid to the said party of the second part, the sum of five hundred (\$500) dollars, on or before one year after the date hereof, together with annual interest thereupon at the rate of six per centum per annum, according to one promissory note bearing even date herewith, executed by said Hiram Smith to the said party of the second part, to which this indenture is a collateral security, then these presents and said note shall cease and be null and void. But in case of non-payment of the said sum of five hundred (\$500) dollars, or the interest thereof, or of any part of said principal or interest, at the time, in the manner, and at the place above limited and specified for the payment thereof, then in such case it shall and may be lawful for the said party of the second part, his heirs, executors, administrators or assigns, and the said party of the first part does hereby empower and authorize the said party of the second part, his heirs, executors, administrators or assigns, to grant, bargain, sell, release and convey the said premises, with the appurtenances, at Public Auction or Vendue, and on such sale to make and execute to the purchasers, their heirs and assigns, forever, good, ample and sufficient deed or deeds of conveyance in law, rendering the surplus moneys (if any there should be) to the said party of the first part, his heirs, executors or administrators, after deducting the costs and charges of such vendue and sale aforesaid.

IN WITNESS WHEREOF, The party of the first part has hereunto set his hand and seal the day and year first above written.

HIRAM SMITH [L. S.]

Signed, Sealed and Delivered
in the Presence of

WINTER WHITE

CHARLES McNIEL.

(A certificate of acknowledgement, as in a deed (See Sec. 208) should be added.)

327. Chattel Mortgages.—When mortgages are confined to personal property they are called Chattel Mortgages. When possession of the mortgaged chattels is immediately delivered to the mortgagee, the chattel mortgage need not be filed or recorded, and need not be even reduced to writing. But when possession of the mortgaged chattels is retained by the mortgagor, the mortgage must be in writing and filed, or recorded (as the law of the place where the chattels are situate requires), or it will be void as to subsequent creditors and as to vendees of the mortgaged property who purchase without notice that the property is mortgaged.

It is always well, though not always necessary, to have a chattel mortgage acknowledged, and in some states subscribing witnesses are required.

Like real estate mortgages, chattel mortgages are, in general, entitled to priority in the order in which they are filed or recorded. But a mortgage known to the mortgagee to be a second mortgage when taken, remains subject to an unfiled or unrecorded first mortgage, filed or recorded later, or, perhaps, not filed or recorded at all.

Creditors whose claims accrued prior to the giving of an unfiled or unrecorded mortgage cannot complain that the instrument was kept from the records, for they have not been injured thereby.

328. The Insecurity Clause.—Chattel mortgages usually provided that, if the mortgagee shall at any time believe that the mortgage debt is insecure, he may immediately take possession of the mortgaged property. It is usually provided that he

shall, upon so taking possession, keep the property in a place of safety until the debt falls due, and then, that he may foreclose unless payment is made. But, from the standpoint of the mortgagee, at least, it is usually better to provide that, upon taking possession of the mortgaged property, he may proceed at once to foreclose upon and sell the same, as, otherwise, storage charges and depreciation will commonly work a reduction of his security.

329. Permission to Sell.—When a chattel mortgage is given upon the stock in trade of a going concern, a clause should be inserted giving the mortgagor “permission to sell out of the mortgaged property in regular course of trade, provided that the total value of the property covered by the mortgage shall not be at any time reduced below its present value.” Such mortgage should be so drawn as to cover all goods from time to time put into or added to the stock.

In many states, chattel mortgages upon stocks of goods left in the hands of the mortgagor for sale in the regular course of trade are held void as to creditors. So in some states “bulk sales” (sale of an entire stock of goods) are void as to creditors unless certain statutory requirements have been complied with.

330. The Mortgage Note.—It is usual to accompany the mortgage with a note (or bond) to which the mortgage is collateral. The mortgage is mere security. An action may be maintained upon the note with or without reference to the mortgage.

The mortgage note should always be identified with the mortgage. This may be done by filling up the blanks of an ordinary note in the usual way and then adding, “This note is secured by a real estate (or chattel, as the case may be) mortgage of like amount and date.”

331. Description of Mortgaged Property.—The property mortgaged should be so described that a stranger could identify it without calling in outside aid. Real estate should be de-

scribed as in a deed. Chattels should be described by kind, quantity, quality, individual peculiarities and special marks.

332. Foreclosure.—If the mortgagor makes default in performance of the conditions of his obligation, the mortgagee may take proceedings to bar all further rights of the mortgagor in the mortgaged property. These proceedings are called Foreclosure.

All valid mortgages, whether of real estate or of chattels, or of both, may be foreclosed by means of an action for that purpose brought in a court of competent jurisdiction. But court proceedings are not always necessary. The statutes of some states provide that real estate mortgages may be foreclosed by merely advertising the property a given length of time, and then selling it at public auction to the highest bidder. Chattel mortgages may usually be foreclosed in this manner.

333. Sale.—Upon sale, the utmost care should be taken to dispose of the property at the highest prices obtainable. Otherwise, the mortgagor may, in some cases, have the sale set aside. The mortgagee may bid upon the property if he does so in good faith, and, in case it is struck off to him, may credit the price upon the mortgage and note.

334. Deficit and Surplus.—If the mortgaged property sells on foreclosure sale for *less* than the amount of the mortgage, interest and costs, the mortgagee has an action against the mortgagor for the deficit. If the property sells for *more* than the amount of the items just named, the surplus will go to the mortgagor, or to those to whom his interest has been transferred by way of second mortgage or otherwise.

335. Rights of Purchaser.—The purchaser at a mortgage sale is substituted to such rights as the mortgagor had in the property at the time the mortgage was given, also to all after-acquired rights covered by the mortgage.

336. Redemption.—In some states the mortgagor is allowed a certain time in which to redeem after the sale. When

this is allowed, redemption may be made by payment to the mortgagee of the debt, interest and cost. The right of redemption may be assigned.

337. Subrogation.—The holder of a subsequent lien by mortgage or otherwise, may pay off a prior mortgage, and, upon so doing, is entitled to an assignment thereof. This right is conferred upon subsequent lien holders to enable them to protect themselves against loss. Sale of property under a prior lien cuts off all subsequent liens. Thus if A, B and C held respectively a first, second and third mortgage on the property of D, foreclosure sale by A would cut off the liens of B and C. Thus, if E bought the property on A's foreclosure, he would take it free from the mortgages of B and C.

338. Dual Mortgages.—When a mortgage is dual in its nature, the provisions of law relating to both real estate and chattel mortgages should be observed. For example, if the property is situate in a state requiring real estate mortgages to be recorded with a register of deeds, and chattel mortgages to be filed with the township clerk, the dual mortgage should be recorded with the one and filed with the other officer.

339. Deeds Operating as Mortgages.—When an absolute deed of land is given as security for the performance of an obligation, the deed will be held by the courts to be a mortgage. It must be foreclosed before title will vest in the grantee. After foreclosure, the grantor will be entitled to redeem the property in the same manner as though the deed had been in the form of a mortgage.

ILLUSTRATION.—Ida A. Clark was the owner of certain real estate upon which a dwelling house was situated. Upon this house she took out a fire insurance policy of \$2,000. One of the provisions of the policy was that it should become void in case of sale and conveyance of the property without the insurance company's consent. Ida A. Clark afterwards gave a deed of the property to Clark A. Rhodes as security for a note, without the insurance company's consent. The house burned and the insurance company claimed that the policy of

insurance had been avoided by the conveyance. The court held, however, that the deed was a mere mortgage, and that, since the policy was not avoided by the giving of mortgages, the policy remained in force.

Sun Fire Office of London v. Clark, 53 Ohio State, 414.

340. Deed with Contract to Reconvey.—When an unconditional purchase and conveyance of property is made, the deed will not be construed to be a mortgage on account of the execution of a contract giving the grantor the privilege of repurchasing the property within a certain time at a fixed price. In this case, the grantee has said to the grantor, in effect: "I will not make you a loan upon your property, but I will purchase it outright. I will then give you an option for its repurchase. If you do not exercise the option, the property will simply remain mine." The same amount of money that would enable you to repay a loan will enable you to exercise the option for repurchase. It is no hardship to you, but it may save me the cost and delay incident to foreclosure of a mortgage."

341. Bill of Sale Given as Security.—When a bill of sale is given as security for the performance of an obligation (for example, as security for the payment of a debt) the instrument, although expressing an absolute sale on its face, will be construed as a mere chattel mortgage. In such case, foreclosure is necessary to vest complete title in the vendee. But, on the same principle expressed in the last preceding section, an absolute and unconditional sale, followed by an option for repurchase, is not a chattel mortgage, and in such case no foreclosure is necessary.

342. Assignment of Mortgage.—A mortgage may be assigned and the assignee will be substituted thereby to all of the rights of his assignor. Assignment of a mortgage carries with it title to the note secured by the mortgage, but assignment of the note does not *ipso facto* carry with it title to the mortgage.

343. Pledges.—A pledge is a delivery of personal property to be held as security for the performance of an obligation.

The person making the pledge is a Pledgor. The person to whom the pledge is made is a Pledgee.

Any personal property may be pledged. Goods, chattels, money, promissory notes, patent rights, copyrights, policies of insurance and money bonds are all subjects of pledge. Shares of corporate stock, on account of their convenience of delivery, marketability and usually known value are used as pledges more frequently than any other class of property. Such shares, indorsed in blank, pinned to a note and delivered to the pledgee, form daily the security for millions of dollars advanced by banks in money centers on call and short time loans.

344. Pledges of Corporate Stock.—When corporate stock is offered as a pledge, the pledgee should assure himself of two things: first, that the certificate is genuine, and, second, that the corporation by which it is issued has no existing lien by law upon the shares which it represents. If there is doubt upon either of these points, the information should be procured from disinterested officers of the issuing corporation. Spurious certificates are not less common than other forgeries. It should be remembered, too, that, when the laws under which a corporation is organized give the corporation a lien (as they frequently do) upon the shares of stockholders who are indebted to the corporation, such lien is paramount to the claim of any pledgee who takes the stock after the corporate lien has attached. Investigation is the pledgee's best protection. He must ascertain the value and condition of the pledged stock at his own peril.

345. Foreclosure of Pledge.—If the pledgor fails to perform the obligation secured by the pledge, the pledgee, after demanding payment, may proceed to foreclose the pledge by advertising it for a reasonable length of time and then selling it at public auction to the highest bidder. Notice of the time and place of the sale should be given to the pledgor.

If the pledged property is of great value, it is sometimes deemed prudent to apply to a proper court for a decree of fore-

closure and order of sale, but this is rarely done, as it involves considerable delay and expense.

At foreclosure sale, only so much of the property can be sold as will pay the debt. But if the property is indivisible, it may all be sold. Any surplus of property or money remaining after payment of the debt, interest and costs of sale, must be delivered at once to the pledgor, or his assigns.

346. Liens.—A lien is a claim and right of possession which one person has upon the property of another as security for some debt or charge.

Liens may be created by contract or by operation of law. Thus mortgages and pledges are created by contract, while vendors' liens, workmen's liens, carriers' liens, innkeepers' liens, attorney's liens, attachment liens and judgment or execution liens are created by operation of law.

347. Vendors' Liens.—A vendor of personal property has a lien thereupon for the purchase price so long as he retains possession. Thus, if goods have been sold by a merchant and set aside for the customer, the customer cannot lawfully take them away until the purchase price has been paid. (But if the merchant voluntarily surrenders possession, he waives his lien.)

Vendors of building materials are usually given a lien by statute upon materials used in making improvements upon land. These liens, to be effective, must usually be enforced within a specified time or the protection will be lost. They are enforced by selling, in due course of law, the debtor's interest in the land. Such liens are inferior to recorded prior mortgages upon the real estate. Thus, when a vendor sells to a vendee of doubtful credit, materials for the construction of buildings which are to be attached to land, he should first investigate the title to the land, so that he may know the extent of the security that may be obtained by lien in case of non-payment.

348. Workmen's Liens.—When a workman performs services upon personal property, he has a lien thereupon for the

value of his services. Thus, a blacksmith who shoes a horse has a lien upon the horse; a repairer of machines has a lien upon the machines repaired; a binder of books has a lien upon the books bound. This lien is absolutely waived by surrender of the property. The lien holder must retain possession, or his lien is lost.

But if the lien holder is dispossessed by force or by stealth, he may retake the property. He cannot, however, recover it from an innocent purchaser to whom the obligee has sold it.

Workmen who construct permanent improvements upon land are usually permitted by statute to acquire a lien upon the land for the value of their services.

349. Liens of Carriers and Others.—A carrier has a lien for his charges upon the goods carried. An innkeeper has a lien upon his guests goods for entertainment supplied. A liveryman has a lien upon animals left with him for care and keep. An attorney has a lien upon the papers of his client and upon the judgment or decree rendered, until payment is made for his services. In all cases, surrender of the property terminates the lien.

350. Liens by Attachment.—A creditor whose claim is due may speedily acquire a lien upon any property, real or personal, not exempt from execution, belonging to his debtor, provided the debtor

- (a) Is about to remove his property from the state; or
- (b) Has sold or concealed his property, or is about to do so, to defraud his creditors; or
- (c) Has absconded or concealed himself to avoid service of process.

There are many other grounds of attachment recognized in various states, the ones just named being, possibly, the most usual. In some states attachments may be issued upon debts not due, but this is not the general rule. In the New England States, attachment is permissible in all actions brought upon contracts.

In most states the plaintiff in an attachment suit must file a bond with the court, indemnifying the defendant against all damages which may be occasioned by the seizure of his property in case the plaintiff fails or neglects to recover judgment.

351. Garnishment.—Garnishment is an attachment of credits, money or property in the hands of a third person. It is of frequent use in the collection of debts. Thus, if A owes B, and C owes A, B may attach the credit of A in C's hands and have it applied in payment of A's debt to B. In states whose laws make no provision for garnishment the same result may be generally attained by attachment.

352. Judgment Liens.—In many states judgments become a lien upon the real estate of the judgment debtor. In other states the lien may be obtained by issuing an execution and making a levy. If the judgment is not paid, the property may be advertised and sold, practically as in the case of a mortgage.

Execution levies may be made upon personal property, which may be sold to satisfy the claim.

353. Exemptions.—The laws of all states of the Union provide that certain of the property of debtors shall be exempt from the liens of judgments, and from seizure by attachment or execution. These laws are made for the benefit of society at large, it being obviously against public policy to make a debtor a public charge by depriving him of his means of support. In most states a homestead of fixed extent or value is thus preserved to the debtor. He is usually spared, also, wearing apparel, household furniture and provisions, necessary domestic animals and the tools or utilities of his trade or profession. Statutes providing exemptions are construed liberally in favor of the debtor ;

The safe of a jeweler has been held exempt.

Re Estate of McManus, 87 Cal., 292.

The piano of a music teacher has been held exempt.

Amend v. Murphy, 69 Ill., 337.

A barber's chair has been held exempt under a statute exempting "tools."

Allen v. Thompson, 45 Vt., 472.

A printing press and type were held exempt under a statute exempting "tools and instruments."

Davidson v. Sechrist, 28 Kan., 324.

Pension money and property purchased with pension money is exempt. The proceeds of a homestead sold are exempt. So if exempt property under insurance is burned, the insurance money is generally held exempt.

ILLUSTRATION.—The books and instruments of a physician, themselves exempt, were destroyed by fire. The property was insured. Creditors of the physician attempted to garnish the insurance money in the hands of the insurance company. The attempt failed. The insurance money was held to be exempt.

Reynolds v. Hanes, 83 Ia., 342.

A homestead, once acquired, remains a homestead until changed by the act of the homesteader. Thus, if a homestead be allowed to one who has a family, the death or removal or abandonment of the man by his family will not cause loss of the homestead exemption.

The time, talents, and industry of a debtor are at his own disposal. He may sell them or give them away. His creditors can lay no claim to them. He may give them to his wife as well as to another. If his wife has a business, he may manage it for her with or without compensation. The fact that his services increase the value of his wife's property will not give his creditors the right to levy upon that property.

ILLUSTRATION.—Mrs. Kaiser established a store at Madison, Wis., known as the "Fair" store. She employed her husband to run this store at a small salary. Creditors levied upon the store property on the theory that Mr. Kaiser had an interest in it by reason of the fact that his labor had helped to build up the business. The court held that the levy could not be sustained.

Meyers v. Kaiser, 85 Wis., 382.

354. Tender.—Mortgages and liens of all kinds are discharged by a tender of the amount due. The mortgagee, pledgee, or other lien holder is entitled to his principal interest, and lawful costs, and to nothing more. When this is properly offered to him, he must accept it or his lien (but not the debt itself) will be discharged.

ILLUSTRATION.—Tousley, being indebted to Baxter in the sum of \$820 secured by a pledge, tendered Baxter that amount. Baxter refused to accept. Held that the securities in Baxter's hands as a pledge were thereby discharged, and that Tousley was entitled to their return.

Norton v. Baxter, 81 Minn., 146.

A valid tender stops the running of interest and the incurrence of further costs.

Tender, to be valid, must be made at a proper time and place. If the tender is pursuant to an obligation to pay money, legal tender money must be tendered.

355. A Valid Tender to any amount may be made in United States gold coin, silver dollars, or treasury notes. Greenbacks are legal tender for any amount except for duties on imports and interest on the public debt. Fractional silver is legal tender in any amount not exceeding ten dollars. Nickel and copper coins are legal tender in any amount not exceeding twenty-five cents. When a piece of coin is so far mutilated that its genuineness cannot be determined, it is not legal tender.

ILLUSTRATION.—A passenger on a street car tendered the conductor a one dollar bill, having torn from its upper left hand corner a portion measuring one inch by one inch and a quarter. The conductor ejected the passenger, and the court held that the ejection was justified. No legal tender of the required fare had been made.

North Hudson County R. C. v. Anderson, 61 N. J. L., 268.

356. Objections to Tender.—If a tender is made in something other than money, as for example, by check, the fact that legal tender has not been offered will not be material if the tender was not refused for that reason. The person to

whom the tender is made should always state his reasons for rejecting it, as objections not made at the time of the tender are usually deemed waived.

357. Exact Amount Must be Tendered.—To be thoroughly safe, a tender should be made in *legal tender money*, in the *exact* amount to be paid. The money should be produced and submitted by the obligor, or his agent, to the obligee or his agent, to be counted. It is always best to make a tender in the presence of witnesses, as proof of the tender may become important.

358. Tender Must be Kept Open for Acceptance.—A tender must be kept good. That is to say, if the obligee changes his mind and decides to accept the amount of a rejected tender, the obligor must make payment, or the effect of the tender (at least so far as the stoppage of interest and costs is concerned) will be lost.

359. Tender Admits Debt.—By making a tender, the obligor admits indebtedness to the amount of the tender. If it is afterwards shown that the amount tendered was insufficient to extinguish the whole obligation then due, the tender will be treated as ineffectual. But the obligor cannot be afterwards permitted to deny that he owes the amount which he has tendered.

360. Payment.—Since payment is merely an accepted tender, it follows that payment discharges all liens. In addition to discharging the liens, it cancels the indebtedness.

When full payment is made, the payor should require surrender of the obligation paid and release of all securities collateral thereto. This is his right and he should insist upon it. But he cannot insist upon the payee giving him a written receipt, unless the payee has contracted to do so.

If a written receipt is given, stating that the maker thereof has received payment "in full of all demands," it will be *prima facie* proof of that fact. But even a receipt in full may be contradicted by verbal testimony.

361. Payment to Wrong Person.—One who pays an ordinary debt without notice that it has been assigned, is released. For this reason, the assignee of an account or other non-negotiable obligation should invariably promptly notify the debtor of such assignment. If, after such notice, the debtor pays the assignor, he is not released thereby, but is still bound to make payment to the assignee.

But one who pays the amount of a negotiable instrument to a person who does not produce and surrender up the instrument paid, may be held to pay the amount over again to a transferee who is a holder *in due* course. For this reason, when a note or bill has been lost, payment thereof cannot be legally demanded without at the same time offering to indemnify the payor against further payment or expense by reason of the lost instrument.

362. Accepting Notes, Checks and Orders in Payment. Accepting the note *of*, or an order *upon*, a third person is not payment of a debt in the absence of an express and definite agreement that such note or order shall be accepted as payment.

Payment made by issuing a worthless check, or a check which becomes worthless before it can be presented for payment in the usual course of business IS NO PAYMENT.

ILLUSTRATION.—A gave a check to B drawn upon C. B sent A a receipt, and without delay sent the check in the usual manner for collection. At the time of presentation of the check C was insolvent. Held, that A's debt to B was not discharged.

Thomas v. Westchester County, 115 N. Y., 47.

363. Voluntary Payment.—One who pays the debt of another cannot recover from the debtor, *unless such payment was made by the debtor's request*. Such payment extinguishes the debt but it leaves the payor without remedy. The proper course, when paying the debt of another, is to take *an assignment in writing* of such debt. When this is done the payor may enforce his demand against the debtor to the same extent that the assignor could have enforced it.

364. Compromise.—When a check is sent, accompanied by a letter, explaining that the check is tendered in settlement of a claim which is unliquidated or in dispute, acceptance of the check and the use of the proceeds will discharge the claim.

ILLUSTRATION.—A owed a bill for medical services charged by the physician at \$670. This amount had not been agreed upon. The debtor sent the physician a check for \$400 accompanied by a letter explaining that the check was tendered as payment in full. The physician accepted and cashed the check and afterwards brought suit for the difference. Held, that he could not recover. By accepting the check he was bound by the terms on which it was tendered.

Fuller v. Kemp, 138 N. Y., 231.

365. Accord and Satisfaction.—An agreement to accept a smaller sum of money as full payment of a *liquidated and undisputed* larger sum, when without consideration, is void. But any benefit or legal possibility of benefit, or any other consideration for the agreement, however slight, will support it. If the debtor does something other than that which he was bound to do by the original contract, whereby an advantage accrues to the obligor, the agreement will be sustained.

ILLUSTRATION.—Parties owed \$7,714.37 on *unsecured* accounts. Their creditor agreed to accept in payment, notes to the amount of \$3,462.24 *secured* by a chattel mortgage. When the latter sum had been paid, the creditor brought suit to recover the difference between the amount paid and \$7,714.37, claiming that his agreement to receive the smaller sum in payment of the larger was without consideration and void. The court held that the giving of negotiable notes *secured* by a chattel mortgage in payment of the larger, unsecured book account was a good consideration, and that the account was thereby paid in full.

Jaffray v. Davis, 124 N. Y., 164.

366. Application of Payments.—When a debtor, having several debts due to the same obligee, makes a payment, he has the right to designate upon which debt he will have the payment applied. He may apply it upon a secured debt, although he may have others due that are unsecured.

If the debtor does not specify upon which of several debts he desires to have a payment applied, the creditor is at liberty to apply the payment as he pleases.

A creditor need not accept less than the full amount of a debt that is due, unless he so elects.

A creditor, if the debtor makes no objection, may apply payments upon unsecured debts when there are secured debts due.

367. Collection of Debts.—From time to time various schemes for the coercion of debtors into payment of debts are brought forward, and business men are led to subscribe to them. A word of warning on this subject may not be amiss. The collector becomes the agent of the creditor. His acts are, in effect, the acts of the creditor. If he resorts to blackmail or libel, the creditor who has authorized the collector to apply such methods will be responsible. All schemes for collection, unless approved by competent legal counsel, are to be avoided as dangerous.

ILLUSTRATION.—Armstrong was a member of the firm of Kabrich & Co. who claimed that Mrs. Mary Vincil owed them a bill of \$3.70 and interest. Armstrong placed this bill in the hands of a Collecting Agency in Chicago. Among other communications, this agency sent Mrs. Vincil one contained in an envelope having in its upper left hand corner, in heavy black type, the words "BAD DEBT Collecting Agency." Of this the Supreme Court of Missouri said: "Was the sending of this envelope with these indorsements on it the publishing of a libel . . . ? We are clearly of the opinion that it was." Armstrong was fined \$500.

State v. Armstrong, 106 Mo., 395.

368. Procedure in Collection.—One who holds an unsecured claim for collection should, in general, proceed substantially as follows:

I. Ascertain as fully as possible the financial condition, resources and liabilities of the debtor.

II. Present the claim and attempt to procure payment of all or at least a part immediately in money.

III. If payment is refused or delayed, attempt to procure a mortgage, pledge or approved note as security.

IV. If security is refused and a crisis in the debtor's affairs seems imminent, prepare to make an attachment levy, if there is sufficient unincumbered property subject to levy available, or if the debtor has friends who are likely to aid him. This may be done by quietly issuing attachment process and by then going with the officer to the debtor and telling him what is to be done if settlement is not made, pointing out to him that the making of a levy will precipitate a crisis in his affairs; that his credit will suffer and that other creditors may petition him into bankruptcy. Induce him, if possible, to give a note signed *by an approved surety or guarantor*. For, if other creditors should afterwards, within four months, petition the debtor into bankruptcy, any preference gained by way of mortgage, pledge or transfer of property would probably be set aside, and the holder of such security would be in no better position than other creditors. But if a note with a proper surety or guarantor is taken, the bankruptcy of the debtor will not discharge the surety or guarantor and the claim will therefore remain collectible in full.

If the debtor is without unincumbered assets, and if he has no friend who is likely to become his surety or guarantor, the only thing to be done is to make persistent presentation of the claim. Call upon him at stated times. Remember that gentlemanly treatment, firmness and punctuality will accomplish more, as a rule, than bluff and bluster. No matter how worthless the claim, never let the debtor know that you think it is worthless. Give him to understand that you regard him as a man of honor who will pay as a matter of course. This apparent opinion will often prove so refreshing to a debtor harassed by less tactful collectors, that he will pay for the sake of retaining your good opinion, while at the same time he will dismiss others with scant courtesy and without paying a cent.

If, after exhausting every means, you are unable to procure any payment, induce the debtor to give you his note. Endeavor to have him keep the interest upon this obligation from falling into arrears. Keep the obligation in force. However improbable it may seem at the present moment, remember that the debtor may some day, by his own efforts, or by some freak of fortune, be able to pay.

If the debtor refuses to give even an unsecured note, it is usually the best practise to place the matter in court and procure judgment. Keep the judgment renewed. It may prove worthless at the very end, but the policy is correct, and you will gain by it far oftener than you will lose.

369. Collection of "Outlawed" Claims.—All states have statutes of limitation which require a claimant to commence his action within a fixed period, or be forever barred from legal remedy. A barred claim is, in common parlance, "outlawed."

It is true that statutes of limitation often work a hardship to creditors, but the absence of such statutes gave rise to vastly greater evils. Before such statutes were enacted, parties might, and often did, wait until witnesses were scattered or dead, papers lost or destroyed, circumstances forgotten and conditions changed, and then proceed to enforce claims against which successful defense might have been made had the action been brought within a reasonable time after the cause of action arose.

The notion that statutes of limitation are intended for the benefit of the dishonest is erroneous. They are intended to keep stale claims out of the courts. The law is intended to aid the diligent, not the indifferent. An outlawed claim is usually the result of neglect.

That a claim is barred by limitation is not conclusive proof that it is worthless. There is a saying that "an honest man's debt never outlaws." Moreover, many debtors are too proud to take advantage of the law, while others are too ignorant to invoke it. Upon finding that a claim is barred by limitation, the creditor should take tactful steps to have the debtor re-instate it.

370. When Does the Statute Become Operative?—

The period of limitation upon a note dates from the time of the last payment of principal or interest thereupon. If no payments have been made, it is computed from the time of maturity. Thus, a note given January 2, 1906, due one year after date would, in the absence of payments or a new promise

in writing, be barred on the last moment of January 2, 1913, in a state in which the period of limitation on notes is six years, without grace. Where grace is allowed, it is to be added to the period of the note, and extends the period of limitation to that extent.

On items of running accounts upon which there have been no payments, the limitation runs from the date of each item. Thus part of such an account may be in force and part of it outlawed. Upon an *account stated* (i. e., where the parties have had a settlement and have agreed upon a balance struck) the statute runs from the date of the settlement. Upon a mutual open account made up of charges and credits, the statute runs from the date of the last item, whether it be a charge or a credit. These are general rules, subject to variation by statute.

371. Suspension of Statute.—It is usually held that the running of the statute of limitations is suspended during the absence of the debtor from the state where the debt is payable.

Thus, if one owing a debt having three years to run before outlawry were to leave the state and remain absent ten years and then return, the debt would still have three years to run before becoming barred.

When a debtor is followed to another state and is sued there, the limitation law of the state where suit is brought governs. For example, in Wyoming the limitation upon accounts is eight years; in California it is two years. Thus, a Wyoming account sued in California, would be held barred in the latter state, although having six more years to run in Wyoming. On the other hand, were a California debtor to be sued in Wyoming on a debt barred in California by reason of being more than two years past due, the courts of Wyoming would enforce the claim if suit were brought in that state at any time within eight years after the debt matured.

372. Limitation Withdraws Remedy.—The statute of limitations does not invalidate the debt; it merely withdraws the tardy claimant's remedy. If the debtor does not insist upon the benefit of the statute, judgment will be entered against him

precisely as though the claim were not outlawed. It is not unusual for debtors, through ignorance or indifference, to permit creditors to recover judgment upon outlawed claims. Such debtors are frequently considerably surprised to learn, afterwards, and when the time for a new trial or an appeal has expired, that such judgments are valid and enforceable.

373. Renewal.—A new, written promise to pay, or a partial payment of an outlawed debt renews the obligation. The renewed obligation is upon the same footing as an original indebtedness.

A new promise to pay, or a partial payment made by one of several joint debtors renews the indebtedness *as to him only*, and not as to joint debtors who do not join in the act of renewal.

ILLUSTRATION.—Shingle and Altman were jointly indebted on a note. Shingle made several payments of interest, but finally defaulted. Action was brought upon the note, and Altman, who had made no payments, claimed that while the note was in force as to Shingle on account of the renewing power of payments, the obligation was not in force as to him, Altman, the statutory time having expired. The court so held.

Cowhick v. Shingle (Wyoming), 25 L. R. A., 608.

374. Unauthorized Application No Renewal.—When one of several debts owed to the same creditor is barred by limitation, and the debtor makes a payment without directing how it shall be applied, the creditor may apply the amount of the payment upon the outlawed claim, but such application will not renew the remainder of such claim.

ILLUSTRATION.—Sawyer owed Blake a store account, barred by limitation, and a note still unbarred. He presented a bill of \$12.30 for services, without designating how he wished it applied. Blake applied the amount on the outlawed account. Held that Blake had a right to do this, but that such application did not renew the barred claim.

Blake v. Sawyer, 83 Maine, 129.

375. Written Acknowledgment.—A written acknowledgment to take an instrument out of the statute of frauds must

be distinct and unambiguous. When there is more than one debt owing to the promisee, the debt must be sufficiently described to be identified. If there is but one debt, that fact may afterwards be shown for the purpose of establishing that there was only one debt to which the promise could relate.

ILLUSTRATION.—A debtor owed one person on six acceptances. He wrote promising to pay as soon as possible. He did not specify which obligation or obligations he meant to pay. Held, the writing did not renew any of the obligations.

Opp v. Wack, 52 Ark., 288.

376. Assignments for Benefit of Creditors.—The common law, and the statutes of most states, permit debtors to assign all of their property to a trustee to be sold by the trustee for the benefit of all creditors. In some states, the assignor is permitted to select and prefer certain creditors. In other states this right is denied. When an assignment is made without preferences, it is more advantageous than bankruptcy proceedings, so far as creditors are concerned, as under an assignment the cost of administering the estate is less than in bankruptcy. But from the debtor's standpoint, bankruptcy is often preferable, as the bankrupt is released from practically all further liabilities, whether his estate pays his creditors fully or only in part. In many states an assignor, who makes assignment for the benefit of his creditors, remains liable for the deficit if his estate fails to pay his creditors in full.

The duty of the assignee is to sell the assigned property and make ratable, lawful distribution of the proceeds to the creditors who prove their claims.

And **377. Bankruptcy.**—Bankruptcy is of two kinds, (Voluntary and Involuntary.) Voluntary Bankruptcy is that which results from the debtor's own petition. Involuntary Bankruptcy is that which results from the petition of persons other than the debtor.

378. Who May Become Bankrupts.—Any natural person who owes debts may become a voluntary bankrupt. Any corporation, except a municipal, railroad, insurance or banking corporation, may likewise become a voluntary bankrupt.

Any natural person (except a wage earner, or a person engaged chiefly in farming or in tillage of the soil) owing debts to the amount of one thousand dollars or over, may be adjudged an *involuntary bankrupt*.

An unincorporated company, and any commercial corporation (except a municipal, railroad, insurance or banking corporation) owing debts to the amount of one thousand dollars or over may be adjudged an involuntary bankrupt.

and
379. Acts of Bankruptcy.—No person, firm or corporation can be adjudged an involuntary bankrupt without having first committed some act of bankruptcy.

The following acts are designated by the law as acts of bankruptcy:

(a) Having conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or

(b) Having transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

(c) Having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or

(d) Having made a general assignment for the benefit of his creditors or, being insolvent, having applied for a receiver or trustee for his property, or when, because of insolvency, a receiver or trustee has been put in charge of the debtor's property; or

(e) Having admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

A person, firm or corporation *capable of bankruptcy* may be adjudged a bankrupt if shown to have performed an act of

bankruptcy, at any time within four months preceding the filing of the petition for such adjudication.

380. Insolvency.—When an act of bankruptcy involves insolvency, the insolvency must be proved unless admitted. A debtor is deemed insolvent when his whole property shall not, at a fair valuation, be sufficient in amount to pay his debts. The term "fair valuation" means present market value. Goods on hand are to be inventoried at their present worth, exclusive of prospective profits. Bills and accounts receivable are to be taken at their actual, not their nominal, value. Property conveyed to others, or wrongfully concealed or removed, is not added to the inventory.

When a bankruptcy proceeding depends upon the insolvency of the defendant, the proceeding must fail if insolvency is not shown.

381. Discharge.—In consideration of surrender of all of his property not exempt from execution, the court has authority to discharge the bankrupt from all of his provable debts, except,

- (a) Taxes;
- (b) Alimony;
- (c) Liabilities arising through fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity;
- (d) Liabilities arising through false representations, or for wilful or malicious injuries to the person or property of another, or for the maintenance and support of his wife and child.

(e) Claims which have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.

382. Debts First Paid.—Before the general creditors can be paid, the following debts must be defrayed out of the proceeds of the bankrupt's estate:

- (a) Taxes;
- (b) Cost of preserving the bankrupt's estate;
- (c) Fees and costs of administration;
- (d) Wages of workmen, clerks and servants, not exceeding \$300 each, earned within three months before the proceeding was commenced;
- (e) *Bona fide* secured claims and claims having lawful priority.

Holders of claims not falling within the classes above enumerated will be paid, without preference and all alike, such per centage of their claims as the residue of the bankrupt's net estate affords.

383. Uses of Bankruptcy.—Bankruptcy is commonly resorted to by debtors to rid themselves of an insupportable burden of debts. The bankrupt is enabled, by surrendering all of his property which might otherwise be reached by legal process, to obtain a new start in life, debt-free.

Bankruptcy is used by creditors as a convenient means of winding up insolvent estates. It is particularly useful when the debtor has attempted to give preferences to favored creditors. By throwing the debtor into bankruptcy, the other creditors are usually able to have such preferences set aside and an equitable distribution made of the proceeds of the debtor's estate.

REVIEW QUESTIONS

1. Give two ways of increasing the capital of a firm.
2. Name several kinds of securities.
3. Name two classes of bonds, and explain the difference between them.
4. Tell how many classes of mortgages you know of, and define each.
5. (a) What is meant by foreclosure?
(b) Give two ways in which a foreclosure may be brought about.
6. Tell what you can about the subject of "Redemption".
7. What is meant by the "Right of Subrogation"?
8. What is the chief object of a bill of sale?
9. What is the effect of assigning a mortgage?
10. When Corporate Stock is offered as a pledge, of what should the pledgee assure himself?
11. (a) What is a lien?
(b) Name two ways in which liens may be created.
12. Define "Workman's Lien", and illustrate.
13. What may a carrier acquire a lien upon? Illustrate.
14. Name three provisions for acquiring a lien by attachment.
15. What is meant by the term "Garnishment"?
16. Is there any way to attain the same result in states whose laws make no provision for garnishment? If so, how?
17. (a) In many states upon what do judgment liens apply?
(b) How is it in other states?
18. (a) By what states have "Exemption Laws" been adopted?
(b) What is the meaning of the law?
(c) Name a few of the things that have been held exempt, as the tools or utilities of trades or professions.
19. (a) What effect has a legal tender upon a lien?
(b) What will be the effect if such tender is refused?
(c) What is legal tender money, and to what amount is each kind legal tender?
(d) In what amount should a tender be made to be thoroughly safe?
(e) What can you say as to the necessity of keeping the tender open?
(f) Does one in any way bind himself by making a tender upon a disputed claim?
20. What will be the effect if an obligor pays a debt to an obligee after the obligee has signed it to a third party?
21. When a debtor owes several debts due to the same obligee

and makes a payment, has a debtor a right to say upon which debt the payment shall apply?

22. What caution should always be used in connection with collecting debts? Why?

23. Name seven logical steps of procedure in the collection of a debt. *several*

24. (a) What law is it that all the states have concerning the limiting of claims?

(b) What is the object of this law?

25. (a) What is the effect of a new, written promise to pay, or a partial payment of an outlawed debt?

(b) Name and define two classes of bankruptcy, and state when one is bankrupt.

PROBLEMS

1. How long does the following guaranty continue?

"Dear Mr. Younker:

Please let L. A. Windom have goods as he may call for them, and I will see that the same are paid for.

A. A. Wood."

2. A writes C a letter guaranteeing that B will pay his indebtedness to C by February 1, 1916. Afterward, without notifying A, C extends the time to March 1. Is A liable? *no*

3. A loans B \$6000 on B's note, guaranteed by C and D. Two notes of \$1000 each, signed by E and F as joint makers were taken by A as collateral to the \$6000 loaned. Afterward A allowed E to give two notes of \$1000 each, signed by E alone, in place of the notes signed by E and F, thus releasing F. This was done without the consent of C and D. Does this release C and D? *yes*

4. A gives B a deed to his house and lot, as security for a note. What effect, if any, does this have on the insurance? *no effect*

5. A, a college professor, became a bankrupt. Could he claim exemption for his library worth \$5000 *yes* if the library was destroyed by fire was the insurance money for the same exempt? *yes*

6. A, having failed in the insurance business, is employed by his wife to manage her department store. Can A's debtors levy on the store property? *no*

7. A owed B \$1000, secured by a real estate mortgage. A tendered B the \$1000 but B refused to accept. What is A's right? *nothing*

8. A tenders a railway ticket agent a ten dollar gold piece in payment for a ticket. The coin is so worn that the engraving is obliterated. The agent refuses the tender, and A is thus forced to *return*

miss his train and suffers a financial loss. Is the railroad liable to A? *Yes*

9. A gives B a check drawn upon C. B gives A a receipt in full. C is insolvent. Is A's debt discharged? *no*

10. H owes N \$1000 for legal advice. He sends N a check for \$700 marked "in full of account". N keeps and cashes the check. Has he any further claim on H? *Yes*

11. A owes B \$5000 on open account. B accepts A's secured note for \$3000 in settlement. Has B any further claim on A? *no*

12. A, a grocer, employs B, a collector, to collect a bill of \$12 from C. B writes C a letter that is held by the court to be blackmail. Is A liable? *Yes*

13. F owes \$36.80 rent to W. The claim is outlawed but W secures a payment of \$3.00. What is the result? *no*

14. A and B owe C on a joint note. A keeps up interest payments but B does not. Action is brought upon the note. B claims that he is not obliged to pay, the statutory time since the note was drawn having expired. Is he right? *Yes*

15. A owes B a note barred by limitation, and a store account not barred. He hands B a sum of money without designating how it is to be applied. May it be applied on the note? What is the effect if so applied? *Yes - on the note, etc.*

16. A owes B on two notes and an open account. All are outlawed. He writes B a letter promising to pay soon. Does this renew the debts? *no*

Corporations.

FORMATION,
MANAGEMENT,
RIGHTS OF STOCKHOLDERS,
DISSOLUTION.

CHAPTER XXV.

CORPORATIONS.

384. Characteristics.—A corporation is a legal person. Its existence is entirely separate from that of the persons who own its shares and administer its business. (These may die, but the corporation will continue unchanged.)

The corporation is not liable for the debts of its stockholders, and the stockholders are not, in general, liable for the debts of the corporation. The corporation acts in its own name. By its own name it purchases and sells property, contracts and is contracted with, sues and is sued.

Through the corporation, the savings of many are accumulated and devoted to a single enterprise. By means of the corporation, the inventor is enabled to ally his ingenuity with capital; the tradesman is enabled to interest his assistants in his business without surrendering control; the promoters of great enterprises are enabled to draw together funds from many sources for the purpose of accomplishing a common object.

It would be difficult to imagine a partnership having several hundred members, each with an equal voice in the management of the concern's affairs; each able to bind the credit of the concern, and each the agent for all the others in the transaction of the firm's business. Clearly, the great undertakings of this country would be impossible were the conduct of business confined to partnerships. Corporations exist of necessity. Corporate organizations having thousands of stockholders are not uncommon. With the funds drawn together from a vast number of contributors, enterprises of magnitude are made possible.

385. Corporations Compared with Partnerships.—

As has been seen, partners are necessarily liable for all of the debts of the firm; each has an equal voice in the business and is the authorized agent of all the others. If a partner dies, the firm is thereby dissolved. Its affairs must be closed up. The good will built up through trade and advertising is thereby lost. If a partner sells his interest, a like result usually occurs. Moreover, money cannot be borrowed upon one's interest in a partnership, nor is such an interest capable of ready sale.

In a corporation the situation is changed. The affairs of the concern are administered by a selected body of men, called directors, who act within fixed limitations. The credit of the corporation can be bound only by compliance with its rules. The individual members are not liable for the debts of the concern, except in rare instances. If the corporate enterprise fails, the individual credit of its stockholders is not involved. The death of a member does not affect the organization. His heirs stand in his stead.

Money may be borrowed upon certificates of corporate stock, and this in no way reflects upon the credit of the corporation. A stockholder may sell and transfer his shares without permission of the other shareholders, and the corporation goes on unchanged. The amount of money which may be placed at the command of an incorporated company is limited only by the size and soundness of the enterprise. Practically all of the great undertakings of this country are now carried on by means of corporations.

386. Charter.—The powers of a corporation are derived from the state, and are expressed in the corporate charter. Corporations are now usually organized under permission conferred by general laws. Each state has statutes under which corporations may be formed. While these statutes differ widely in scope and requirements, their purposes are similar. Such laws usually provide that any number of persons, not less than three, may form a corporation by signing and acknowl-

edging before some officer authorized to take acknowledgments, articles of association in writing, specifying,

- (a) The name of the corporation,
- (b) The amount of its capital stock and the number of shares into which the same is divided,
- (c) The place at which the business of the corporation is to be conducted,
- (d) The purpose or purposes for which the corporation is formed,
- (e) The amount of capital stock subscribed, and the proportion thereof paid in at the time of organization,
- (f) The duration of the corporation, which in many states is unlimited,
- (g) The names and addresses of the incorporators, and the number of shares of stock subscribed for by each.

387. (a) Name.—The name assumed by a corporation must not conflict with the name of another existing company engaged in the same or a similar line of business. The use of a name which does so conflict may be enjoined by the courts.

ILLUSTRATION.—One Isaac W. Lamb was instrumental in forming a corporation for the manufacture of knit-goods, principally gloves and mittens, under the name Lamb Knit-Goods Company. Becoming dissatisfied, Lamb afterwards withdrew from this corporation, removed to another town and in conjunction with others, formed a new corporation for the same general purpose, under the name Lamb Glove & Mitten Company. The court restrained the latter company from using the name Lamb Glove & Mitten Company, that name being held to conflict with the name of the company first formed.

Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co., 120 Mich., 159.

388. (b) Capital Stock and Shares.—The capital stock of a corporation is the total amount which the company is able to obtain by the sale of its stock at par.

The equal parts into which the capital stock is divided are called shares.

Shares are "fully paid and non-assessable" when par value has been paid to the corporation for them in cash or in property.

Shares become "treasury stock" when they have been once issued by the company for par value and have been afterwards reacquired by the company through gift or purchase.

When shares are originally sold by the company for less than par value they remain subject to assessment for an amount equaling the difference between the price paid for them and par. Thus, if shares are originally sold by the corporation at 40 cents on the dollar of face value, they remain subject to an assessment of 60 cents on the dollar, and this assessment may be enforced by creditors of the company. In other words, it is the right of creditors of a corporation to have all shares issued by the company represent dollar for dollar, cash or property actually paid in to the company.

But when stock has been once issued for par value and is afterwards reacquired by the company, the company may reissue it at any price fixed by the board of directors, and such reissued stock, though sold at less than par, having been once fully paid, remains non-assessable. In other words, fully paid "treasury stock" is non-assessable, no matter at what price it is issued.

Shares usually have a face value of from \$1 to \$100. When the stock is intended to be distributed among a large number of small investors, the shares of the lower face value are preferable. But when the investment is to be made by people of considerable means, or by a few stockholders, the larger par value should be adopted.

389. Payment for Stock.— Stock may be paid for in cash or in property. For this purpose, the term "property" includes lands, chattels, leases, good will, trade marks, patents, copyrights and personal services.

In many states the judgment of the directors is, in the absence of fraud, taken as conclusive of the value of property accepted by the corporation in payment for shares. Since the value of many kinds of property (as, for example, patents, trade marks and good will) is largely a matter of opinion, it is not unusual to find all or a large part of the capital stock of a corporation originally paid up by sale to the company of prop-

erty at an inflated valuation. When stock is issued for property at an overvaluation, the stock is said to be "watered."

† **390. (c) Location.**—The articles of association usually set forth the location of the principal place of business of the company. In most cases this must be within the state where the corporation is chartered. In ordinary companies formed for trading and manufacturing, it is best to obtain a charter in the state where the company's principal operations are to be conducted. The reason for this is that domestic corporations are usually more favored than foreign corporations by state legislation. Almost all states impose restrictions upon foreign corporations, and it is within the power of a state to exclude any foreign corporation altogether, provided such exclusion does not interfere with inter-state commerce.

† **391. (d) Powers and Purposes.**—The purposes of a corporation are the objects for which it is created. Its powers are the means by which those objects are attained. In some states (notably New Jersey, Maine and Delaware) corporations are permitted an almost unlimited range of purposes, although their powers are but slightly greater than the powers of corporations organized in less liberal states.

A corporation has no powers except those conferred upon it by its charter, and such implied powers are necessary to make effective the powers expressly conferred. Thus, a corporation having *express* power to conduct manufacturing, would have *implied* power to acquire land and to build a factory thereupon. But a manufacturing corporation would not have *implied* power to organize subsidiary corporations in other states.

When a corporation performs an act unauthorized by its charter, the act is said to be *ultra vires* (beyond power). But the corporation will not be permitted to accept the benefits of an *ultra vires* act and at the same time to shield itself from liability by a claim that the act was unauthorized.

The ordinary powers of a corporation are to contract and to be contracted with, to purchase, hold and deal in property, to

sue and to be sued, but all of these acts are to be done within the scope of the corporate purposes and pursuant to its charter and by-laws.

392. (e) Subscriptions and Payment Thereof.—

Articles of association usually include a statement of the number of shares subscribed by each of the signers thereof. When signed, the articles of association form a written subscription on the part of each incorporator for the number of shares written opposite his name. Thus all incorporators become stockholders from the moment of signing the articles. This subscription interest entitles them to vote at all meetings of the stockholders. The interest is assignable, and may be transferred to another before any stock certificate has been issued, and the transferee will substitute to all the rights of the original subscriber.

Subscriptions may be made apart from the articles of association, either before or after the company is incorporated. A subscription made before incorporation is a mere offer and may be accepted or rejected by the company after incorporation.

Payments upon subscriptions are usually called in by the board of directors from time to time as the funds are needed. Payment of a valid subscription, upon which default has been made by the subscriber, may be enforced by suit.

393. (f) Duration.—In some states perpetual charters are granted. In other states corporate existence is limited to a term of years. It is usually provided, however, that when the corporation has reached the fixed limit, it may be continued by reorganization without liquidation.

394. (g) Incorporators.—The persons who join in forming a corporation are called "Incorporators." Since articles of association are a contract between the signers and the corporation formed, it follows that the incorporators should be persons capable of binding themselves by contract.

395. Recording Articles of Association.—When the articles of association have been properly filed and recorded as required by law, the organization becomes a corporation *(de jure)*. That is to say, it is a corporation as to all the world. If, through any neglect, technical compliance with the law is omitted, the organization, instead of becoming a corporation *de jure*, becomes a corporation *de facto*. That is to say, it is a corporation as to the whole world, except the state under whose laws it is created. The state alone, and not private individuals, can take advantage of the fact that the corporation is improperly formed.

Where the purposes stated in the articles of association of a corporation are entirely foreign to the law under which it assumes to exist, or where incorporation is attempted under a void law, no corporation, either *de jure* or *de facto*, results. In such case the incorporators become *copartners* and remain liable as such.

ILLUSTRATION.—Walker, Hopkins & Co. attempted to incorporate under an act of the legislature of Michigan. The act was afterwards held unconstitutional and void. In the meantime Walker, Hopkins & Co. had contracted debts as a corporation. It was held that they were liable for payment of these debts *as co-partners*.

Eaton v. Walker, 76 Mich., 579.

When a corporation is organized under a general law, *the statute under which it is formed, together with its articles of association*, constitute its charter. One who would inquire into the authority of a corporation must seek them in these instruments. These are the measure of the corporation's powers.

✱ **396. By-Laws.**—Next in authority after the charter are the rules of corporate conduct formulated by the stockholders. These rules are called By-Laws. When reasonable, they are binding upon all members of the corporation, and upon third parties who have notice of their provisions. But they are not binding upon third parties without notice. An unreasonable by-law is void.

If by-laws are in conflict with the terms of the charter, they will be void to that extent. The charter is paramount.

The by-laws usually fix the dates for the holding of meetings of the stockholders and of the board of directors; define the powers and duties of the officers, of the company; provide the date of termination of the fiscal year, and the time for the payment of dividends. They should also in every case provide the means for their own amendment, unless provision therefor is made by the statute.

The making of by-laws is one of the principal rights of the stockholders. Under the laws of some states, this right may be delegated to the directors. When both the directors and the stockholders have the right to make by-laws, the by-laws made by the stockholders will prevail in case of conflict.

The following set of by-laws will afford the student a general view of the subjects usually covered in such instruments:—

BY-LAWS
OF
THE AMERICAN WHEEL MANUFACTURING CO.

1. ANNUAL MEETING. The annual meeting of the stockholders of this corporation shall be held on the second Tuesday in the month of January in each year, beginning with the year A. D. 1907, and at the hour of 8 o'clock p. m. at the place of business of said corporation in the city of Detroit, Michigan, when the stockholders shall elect by ballot a board of nine directors, who shall each be stockholders of said corporation, and who shall be elected for a term of one year, and to hold such office until their successors shall have duly been elected.

2. QUORUM. A quorum of the stockholders shall consist of the holders of a majority of the capital stock of this corporation, at the time outstanding, being present in person or by proxy.

3. VOTES. Each share of stock of this corporation issued and outstanding shall entitle the holder thereof, or his lawful representative, to cast one vote on all questions coming before any meeting of the stockholders.

4. PROXIES. Stock of this corporation may be voted upon by the holder thereof, either in person or by proxy. Proxies, to be operative, must be in writing, signed by the principal and filed with the secretary of this corporation.

5. NOTICE OF ANNUAL MEETING. Notice of the time and place of holding the annual meeting shall be sent by the secretary of this corporation to each stockholder annually, by depositing such notice in the mail, with postage fully prepaid, addressed to the last address of such stockholder appearing upon the books of the corporation; and such notice shall be so mailed at least five days prior to the holding of such meeting.

6. SPECIAL MEETINGS OF THE STOCKHOLDERS. Special meetings of the stockholders may be called by the president of this corporation, or by a majority of the board of directors, or by the holders of a majority of the capital stock outstanding, by filing with the secretary of this corporation a written call for such meeting, signed by the persons calling the same, which call may be in the following form:—

TO THE STOCKHOLDERS OF THE AMERICAN WHEEL MANUFACTURING COMPANY:

Please take notice that a special meeting of the stockholders of the above named company will be held at , in the city of Detroit, Wayne County, Michigan, on the day of , A. D. 19...., at the hour of o'clock in the , for the purpose of considering and taking action upon

(Here insert the object of the meeting.)

Dated

.....

(Here affix signatures of the persons by whom the meeting is called.)

And upon receipt of such call, the secretary shall cause copies thereof to be made, and shall mail one copy to each stockholder, in the same manner as is hereinbefore provided for the mailing of notices of the annual meeting; but it is expressly provided that if such secretary shall neglect or refuse to procure and mail such copies of said call, then and in that event the persons by whom the call is made may perform the duties of the secretary in that respect and with like effect.

7. MEETINGS OF THE BOARD OF DIRECTORS. Regular meetings of the board of directors shall be held at the office of this corporation on the first Tuesday in each month, at the hour of eight o'clock p. m. Special meetings of the board of directors may be held at the call of the president, or of any two members of the board of directors, as he or they shall deem necessary.

8. **QUORUM OF DIRECTORS.** A majority of the board of directors properly convened, shall constitute a quorum.

9. **POWERS OF BOARD OF DIRECTORS.** The stock, property, affairs and business of this corporation shall be supervised, controlled and managed by the Board of Directors thereof, who shall have power to delegate their executive authority to such agent or agents as they may from time to time appoint. They shall also have full power to fix, from time to time, the salaries of all officers of the corporation.

10. **OFFICERS.** As soon as may be after the annual election of directors in each year, the board of directors elected thereat shall convene, and shall elect from among its members a president, a vice-president, a secretary and a treasurer. The board may also appoint such other officers and agents, to act by and under the direction and control of the board of directors, as it may see fit.

11. **PRESIDENT.** The president shall preside over all meetings of the stockholders and of the board of directors and of all standing committees. He shall be custodian of the bond given by the treasurer; he shall affix his official signature to all stock certificates, conveyances and transfers of corporate property, and to all other instruments whereunto such signature shall be requisite.

12. **VICE-PRESIDENT.** The vice-president shall have and exercise all of the powers and duties of the president during the absence or disability of the president.

13. **SECRETARY.** The secretary shall make and preserve in books belonging to the corporation, records of all meetings of the stockholders and of the board of directors. He shall attend to the preparation and mailing of notices of all meetings whereof notice by mail is herein required. He shall affix his official signature to all stock certificates issued by this corporation, and to such other instruments as may require such signature. He shall deliver to his successor in office all corporate property that shall be in his possession at the end of his term of office, and shall perform all other duties required of him by the board of directors.

14. **TREASURER.** The treasurer shall correctly keep all accounts of the corporation in books belonging to the corporation. He shall make and preserve full and accurate records of all receipts and disbursements thereof, and shall collect, and deposit all moneys of the corporation in such depository as shall be selected, from time to time, by the board of directors. He shall disburse the funds of the corporation in payment of corporate obligations, approved by the board of directors, taking proper vouchers therefor. When requested so to do by the board of directors, he shall make and file with the president of this corporation a bond in such amount and with such surety or sureties as shall be approved by the board of directors, conditioned for the faithful

performance of the duties of his office. Provided, that if a surety company bond shall be required by the board of directors, this corporation shall bear the reasonable cost thereof.

The treasurer shall receive and safely keep, and shall promptly deliver over to his successor in office, the corporate seal, all documents and other instruments in writing belonging to the corporation. He shall also perform such other duties as shall be delegated to him by the board of directors.

15. JOINDER OF OFFICES. Any two offices of this corporation may be held by one and the same person.

16. VACANCIES. In case of vacancy occurring in any office, or upon the board of directors, such vacancy may be filled by appointment of any stockholder of this corporation thereto, which appointment shall be made by a quorum of the board of directors, duly convened.

17. CHECKS, DRAFTS AND ORDERS. All checks, drafts and orders for payment of money shall be signed by the treasurer.

18. PROMISSORY NOTES. All promissory notes made by this corporation shall be executed in the corporate name by the president and treasurer thereof.

19. CORPORATE SEAL. This corporation shall have a corporate seal and the treasurer shall be custodian thereof, with full power to affix the same to such instruments as shall require its use, either by law, by resolution or by custom.

20. FISCAL YEAR. The fiscal year of this corporation shall end on the 31st day of December in each year hereafter, beginning with the year 1906.

21. TRANSFERS OF STOCK. All transfers of stock of this corporation shall be made upon the corporate books by the holder of the shares in person, or by attorney, and no transfer shall be deemed complete and binding upon the company until the same shall have been so made, and until the certificate or certificates thereof shall have been surrendered to the company, properly indorsed, and a new certificate or certificates shall have been issued instead thereof.

22. DIVIDENDS. Dividends, when earned and declared, shall be payable on the first Monday in February in each year. Dividends at any time payable to any person who is then indebted to this corporation, may be applied upon such person's said indebtedness in reduction thereof to such extent as the board of directors shall by resolution determine.

23. AMENDMENTS. The stockholders of this corporation may, by a two-thirds majority vote of a quorum present at any annual meeting, or at any special meeting having that purpose mentioned in the notice thereof as one of said meeting's objects, alter, amend or repeal these by-laws, or any of them.

397. Preliminary Investigation.—Before investing, investigate. Before becoming a stockholder in a corporation, one should familiarize himself with the laws under which the company is organized; one should examine the concern's articles of association and by-laws. The investor should require and retain a financial statement of the condition of the company, its assets and liabilities, and should learn something of its history and of the capacity and integrity of its managing officers. Good management will make almost any business flourish; continued bad management will wreck the most promising enterprise.

If the corporation is a new one, or one whose stock values are not established, the investor should assure himself that he is not paying for fictitious values. He should remember that his shares merely represent a proportionate part of the net assets of the concern. For example, suppose that A, B, and C form a corporation with an authorized capital stock of \$30,000, one half of which they pay up by selling to the company patents of no present value. Then suppose that D buys the other half of the company's stock for \$15,000 in money. The immediate result is that A, B, and C together now own in effect, a half interest in D's \$15,000 of money, while D has received for it, in effect, a half interest in their worthless patents. If the corporation were liquidated at once (supposing it to be without debts) the patents would sell for nothing and D would receive back only \$7,500 upon his investment, while A, B, and C would together receive the remainder, or \$7,500. This shows the real standing of the parties. True, the patent *may* prove valuable, but D's cash is of fixed and certain value and should not have been invested without such concessions as would afford its investor proper remuneration for his risk. This inequality between money and property of unascertained value is often corrected by issuing a class of shares known as "preferred stock."

398. Kinds of Stock.—Shares of stock are either Common or Preferred.

Common Stock is without special contractual advantages, Preferred Stock enjoys such advantages. It is usually entitled

to payment of dividends to a certain amount before the common stock can participate in the corporation's profits. Preferred stock may be either cumulative or non-cumulative. When cumulative, it must be paid the amount of all passed dividends whenever there are sufficient declared net profits to pay them, and before any dividends can be paid upon the common stock. When preferred stock is non-cumulative, a dividend passed is lost. There is then no obligation to make good the passed dividend out of future profits.

The preferences accorded to preferred stock are based upon contract between the stockholders and the corporation. The terms of the contract are usually printed upon the certificates of the preferred shares. These terms vary greatly in different corporations. Sometimes preferred shares are made "fully participating." That is, after payment of a certain per cent of dividends upon them, they are entitled to share with the common stock, without distinction, in all remaining declared net profits. Again, we find preferred shares made non-participating. That is, after payment of a fixed per cent upon them at the dividend periods, they receive nothing more, no matter how great the profits of the concern. Thus, it sometimes happens that a company's preferred stock will be receiving only 6% per annum, while its common stock will be receiving, perhaps, 25% per annum. In that event, the common stock will, of course, be of greater value than the preferred. In general, however, the preferred stock is the more valuable.

399. Voting Powers.—Unless otherwise provided by law, each share of stock entitles the holder thereof to one vote on all subjects coming before any meeting of the stockholders. In the absence of contrary provisions, there is no distinction between the voting power of common shares and of preferred shares. It is lawful, in the absence of a statute to the contrary, to provide that preferred stock shall have restricted voting power, for example, that it shall be entitled only to a minority representation on the board of directors. Since the holders of the common stock can receive no profit until the preferential dividend shall have been paid, it is often deemed

just to give them the management of the corporation, so that they may have fullest opportunity to make a profit for themselves as well as for the holders of preferred shares.

(One who owns or controls one share more than half of the issued stock of a corporation can control the policy of the corporation.) He can choose at least a majority of the board of directors, and, in states where the cumulative voting law is not in force, he can elect the entire board. As a corporation's business is managed by its board of directors and that board's agents, and not by its stockholders, control of the board is control of the company.

§ **400. Cumulative Voting.**—By statute in a number of the states, the holders of less than half the stock of a corporation can, by concerted action, elect a minority of the directors. In such states, the whole number of directors must be balloted upon at one time. (Each stockholder may cast as many votes as he has shares for each candidate, or he may accumulate all of his votes upon one candidate, or he may divide them among several candidates. For example, suppose a corporation to have 1,000 shares issued, of which A controls 501 and B 499. Suppose that 5 directors are to be chosen. The vote is to be by ballot and the 5 persons receiving the greatest number of votes will be elected. A has 501 votes for each candidate, or 2,505 to cumulate and distribute. B has 499 votes for each candidate, or 2,495 votes to cumulate and distribute.

Now if A were to cast 501 votes for each of 5 persons and if B were to cumulate his votes equally upon 4 persons (623 votes each) B's four candidates would be elected. But A will not do this. Nor will he cumulate his votes upon 4 persons, for, in that event, if B cumulated upon 3, B's 3 candidates would be elected, since A can cast only 626 votes for each of 4 persons while B can cast 831 for each of 3 persons. A will cumulate his votes upon 3 persons and B will cumulate his votes upon 2 persons, A casting 835 votes for each of his 3 candidates and B casting 1,247 votes for each of his two candidates, whereby A will elect a majority and B a minority of the board.

401. Proxies.—Shares may be voted by the holder thereof, either in person or by proxy. A proxy is merely a power of attorney conferring authority upon an agent to vote the shares of the principal. Such an authority may be revoked at any time, unless coupled with an interest. It may be conferred upon any person who is capable of being an agent. The agent need not be himself a stockholder. The following is a common form of proxy:—

PROXY.

I hereby appoint and constitute John Doe, of Detroit, Michigan, my true and lawful agent and attorney, for me and in my name, place and stead, to vote upon all shares of stock of The American Wheel Manufacturing Company, upon which I am or shall then be entitled to vote, upon all matters of every nature coming before that certain annual stockholders' meeting of said corporation called to be held at the office of said corporation in the city of Detroit, Michigan, on the 28th day of February, 1906, at the hour of 3:30 o'clock p. m., and at all adjourned sessions, if any, of said meeting, hereby ratifying and confirming all that he, my said agent and attorney, may do by virtue hereof, as fully and to the same extent as though such actions were performed by me personally.

RICHARD ROE.

Dated: February 26, 1906.

402. Transfers of Stock.—The by-laws of corporations usually provide that the stock shall be transferable upon the books of the company only. (This provision does not invalidate transfers made by mere indorsement and delivery. In other words, the owner of stock, notwithstanding the by-laws, may transfer his title by merely indorsing his certificate and delivering it to his transferee.

The purpose of by-laws requiring transfers to be made upon the books of the corporation is to enable the corporation to at all times know who are its stockholders. It has a right to rely upon its records upon this point. For example, if the corporation pays a dividend to A, the registered holder, without notice that A had previously transferred his shares to B, B cannot recover the dividend from the corporation.

Every corporation should keep a transfer book in which each transfer of stock should be entered. Transfers are made by the transferor indorsing an assignment upon the stock certificate and surrendering the certificate to the company for re-issue pursuant to the terms of the transfer. The surrendered certificate should be cancelled by the company and retained. In small companies it is a common and commendable practise to attach the surrendered certificate to the stub of the stock certificate book from which it was originally taken. This method preserves a record of the transaction and prevents the misplacement of the surrendered certificates.

One who is the *bona fide* transferee of stock is entitled to have his shares transferred in regular form upon the books of the company, and the officers thereof have no right to deny him this privilege through fear that his ownership of the stock may be detrimental to the interests of the company.

ILLUSTRATION.—Rice acquired six shares of Standard Oil Trust stock. The management of the Trust believed Rice to be hostile to it, and declined to enter the transfer of the shares acquired by Rice upon the books of the company. Rice brought an action to compel transfer and the New York Court of Appeals sustained his right thereto.

George Rice v. John D. Rockefeller et al., 134 N. Y., 174.

403. Powers and Duties of Officers.—The officers of a corporation consist primarily of a board of directors. This board usually elects from its own number a president, vice-president, secretary and a treasurer. It may also appoint such other agents as the purposes of the corporation require. Frequently the directors appoint a superintendent, a general manager and legal counsel.

404. Directors.—In general, the directors of a corporation are charged with the management of the property and affairs of the company. A director, as such, has no more authority than any other stockholder, except during a session of the board duly convened. Even a majority of the board of directors have no power to bind the company by their action, except by means

of motions and resolutions passed at a session of the board. Directors or other persons may, however, be given authority as agents to bind the company by their acts. (The agent of a corporation stands upon the same footing as the agent of a private individual.) Thus, when a corporation permits an employee to notoriously and openly transact its general business, the corporation can not deny that such agent had authority to do the acts which it has without objection permitted him to perform.

405. President.—The president of a corporation, by the mere fact of holding that office, has no greater power than any other director, except as such power is delegated to him by the charter, the by-laws, or the acts of the board of directors. Proportionately as these powers conferred are broad or limited, he will find himself ranking anywhere from a mere figure-head to an almost absolute dictator. However, when he exceeds his authority the corporation is not bound by his acts, unless it ratifies them.

406. Vice-President.—In general, the vice-president of a corporation has no special powers when the president is present. But when the president is absent or disqualified, the vice-president succeeds for the time being to all of the powers of the president.

407. Secretary.—The secretary of a corporation is the keeper of the records of its meetings. These records should be preserved fully and with care. When properly kept, *they are the memory of the corporation*. All motions and resolutions should be entered thereupon and the first act of each meeting should be the reading, correction and adoption of the minutes of the last preceding meeting. The secretary may have delegated to him such other duties as the board of directors designate, or as the charter or by-laws provide.

408. Treasurer.—The treasurer is the custodian of the corporate funds. These he should keep in a depository selected by the board of directors. It is quite customary to place the

treasurer under bond for the faithful performance of the duties of his office and for prompt surrender to his successor in office of all books and property incident thereto.

The treasurer should keep an accurate record of all receipts and disbursements. Wherever it is practicable, disbursements, even of small sums, should be evidenced by proper vouchers which should be carefully preserved. It is well to have the books of the treasurer audited by a disinterested committee, or by an expert accountant, at least once in each year. This affords protection to the treasurer as well as to the company, and is a practise strongly commended.

409. Salaries of Officers.—The directors, as such, are not entitled to salary in the absence of an express provision therefor by by-laws or charter. A director may, however, become entitled to salary by reason of special services rendered. Thus it is perfectly proper to provide that the president, secretary, treasurer, manager and attorney shall have a fixed salary. It is also proper to provide that the directors shall be given compensation for attendance upon the meetings of the board. But, in the absence of any such provision, there is no implied contract on the part of the corporation to pay directors, as such, for their services. Neither is there an implied contract to pay the officers of the company for ordinary services rendered in the discharge of the duties of their respective offices. But, if an express contract to pay is made, it will be binding.

Salaries voted by directors to themselves, or fixed by those in control of the corporation to the detriment of the minority stockholders will generally be held *illegal if it appears that such salaries are excessive.*

410. Annual Reports.—Under the laws of most states, corporations are required to file with some state officer an annual report setting forth certain information designed for the benefit of the state and the public at large. Penalties for failure to file such reports are usually imposed. Since the law does not favor penalties, the state must do everything required on its part in order to charge the corporation, its officers and

stockholders with liability upon default. It is generally provided that a corporation which fails to perform the duties required by the state, or which violates its charter, may have its charter cancelled by the state.

411. Receivers.—When a corporation has become insolvent, or is being grossly mismanaged, it is generally possible for its stockholders, its creditors, or its directors to cause the company to be placed in the hands of a receiver. The receiver is merely the agent of the court for the purpose of managing the company's business with a view to correcting its defects, if possible, and again restoring it to its stockholders. If correction is found impossible, the receiver winds up the affairs of the concern, collects its assets and distributes the same to its creditors. If funds are left after the payment of creditors and all expenses of the receiver's administration, these funds are divided ratably among the stockholders, usually with a preference to the holders of preferred stock, if any there are.

412. Dissolution.—A corporation may usually be dissolved by consent of its stockholders. When a corporation's charter expires, the company usually has the privilege of either reorganizing or going into liquidation. If the latter course is adopted, the assets of the concern are sold, its debts and expenses of administration are paid, and the net residue, if any, is divided among the stockholders according to their respective holdings. Upon dissolution, holders of preferred shares must, usually, be paid the par value of their stock, plus accumulated dividends due, before any payment can be made to the holders of common stock.

REVIEW QUESTIONS

1. What is a corporation?
2. Give six points of comparison between corporations and partnerships.
3. What is a charter and how is it obtained?
4. Define the following terms: Capital Stock, Shares, Par Value, Treasury Stock, Watered Stock.
5. What is meant by the powers and purposes of a corporation?
6. What states are especially noted for the almost unlimited range of purposes for which they will charter corporations? Are the powers they grant greater than the powers granted by other states?
7. (a) What limits the powers of a corporation?
(b) What is meant by subsidiary powers?
8. Who are the incorporators of a corporation, and what legal limitation is placed upon them as to numbers and capacity?
9. (a) Define the terms: "de jure", "de facto", "ipso facto".
(b) When is an organization said to become a corporation *de jure*?
10. What comes next in authority after the charter in the government of corporations?
11. Name and number at least 15 of the 19 important features commonly covered by a set of by-laws, say of a manufacturing company.
12. What should one always do before investing?
13. (a) How many and what classes of stock shares are commonly recognized?
(b) Define each.
(c) Give some of the advantages of each under varying circumstances.
14. How are stockholders' voting powers controlled and regulated?
15. What is meant by the expression "Cumulative Voting", and what advantage may be derived from it?
16. Tell what you can of the term "proxy" as associated with corporations.
17. (a) Primarily, the officers of a corporation consist of whom?
(b) What elective and appointive power have they?
18. Number and name the usual officers of a Board of Directors of a corporation, giving briefly the general duties of each.
19. (a) What steps are frequently taken to insure the safe handling of the corporate funds?
(b) What is necessary to be done to discharge all the obligations thus imposed?
20. What can you say regarding salaries of directors and officers, as such?

21. Tell what you can concerning the Annual Reports of corporations.

22. (a) What is usually done upon a corporation becoming insolvent?

(b) Who may cause this to be done?

23. By whose consent may a corporation usually be dissolved?

24. When a corporation's charter expires, what privileges have the stockholders, usually?

25. Do holders of preferred stock have any advantage over holders of common stock in the process of liquidation?

PROBLEMS

1. A stockholder in the Ellis Publishing Company, Battle Creek, Mich., becomes dissatisfied with the management of the company, withdraws and forms a new corporation at Detroit under the name of the Ellis Text Book Company. The Ellis Publishing Company brings an action against the latter company to restrain this company from using the name, Ellis "Text Book Company." What is the result?

2. A, B & Co. attempt to incorporate under a legislative act that is afterward held unconstitutional. They have done business and contracted debts as a corporation. Who is liable for the debts?

3. A acquires 10 shares of stock in the United States Steel Corporation. The management of the corporation refuses to enter the transfer of the shares upon the books of the company. Can A compel the entry? *Yes*

4. The M and N Company is incorporated for the purpose of dealing in real estate. The company borrows \$500 and gives its note. Can it legally do this? *Yes.*

5. Can the above company place a mortgage on its real property? *Yes*

6. Can the above corporation form a partnership with a person in another city? *Yes*

7. In the first problem suppose the new corporation had organized under the name of the Ellis Printing Company? Or, the Ellis Supply Company? *Same result.*

8. A subscribes for stock in a corporation upon representations by the agent that the corporation has flattering prospects, and that it will make enormous profits. The corporation does not make any profit. Can A avoid paying for the stock? *No*

9. Suppose, in the above question, the agent represented that the corporation had made a profit of twenty per cent the past year, and it is later found that this is a misrepresentation, and that no profit has been made. Can A avoid paying for the stock? *Yes*

10. Several corporations form an association for dividing territory and fixing prices. Discuss the legal standing of the agreement?

Not legal.

Combination in restraint of trade.

GENERAL REVIEW

1. Upon what is every law said to rest?
2. Of what does the common law consist?
3. Discuss the origin and growth of the common law.
4. What is statute law?
5. What is "the supreme law of the land"?
6. Discuss caution in business.
7. Give some special cautions.
8. Define negligence and discuss the penalty of negligence.
9. Discuss care in executing written instruments.
10. Name and distinguish between two kinds of property.
11. What can you say of the right to defend property?
12. Define the terms Trover and Replevin.
13. Does lost property always belong to the owner?
14. Define contract.
15. Must all contracts be in writing? Explain.
16. Name and define the classes of contracts.
17. Name the essential elements which must appear in every valid contract.
18. Distinguish between agreement and contract.
19. Distinguish between the two kinds of offers.
20. When must an acceptance be made?
21. When may an offer be revoked?
22. What is usually the authority of traveling sales agents?
23. What is the safest way to make revocation? Why?
24. What about contracts made on Sunday?
25. Name five classes of contracts which, under the Statute of Frauds of most states, are required to be in writing.
26. Is any special form necessary for written contracts?
27. Name six essentials that a memorandum should show.
28. Who must sign the memorandum?
29. How should an agent sign a memorandum?
30. Name four classes of persons by whom contracts made are usually void or voidable.
31. What is an infant?
32. Discuss dealing with infants.
33. What can you say about dealing with lunatics and drunken persons?
34. Are contracts valid when made under duress?
35. Discuss contracts of married women.
36. Define consideration.
37. Discuss absence of consideration. Good consideration.
38. Name two classes of void contracts.

39. Name seven classes of contracts held void by the statutes of most states.
40. Mention six ways in which contracts are commonly terminated.
41. Discuss each of these ways.
42. Give the sixteen reasons for non-compliance when one is called upon to perform a contract.
43. Who is an agent?
44. Distinguish between general and special agents.
45. Give powers and duties of general agents. Of special agents.
46. Give three ways in which an agent may act so that he, himself, is bound.
47. Give the five ways by which an agency may be terminated.
48. What are the four classes of partners?
49. What is a trading partnership? A non-trading partnership?
50. Can a partner acting as the agent of the firm make a contract with himself?
51. What is a partner's remedy in case he has been unfairly dealt with by the other partners?
52. Are partners entitled to compensation for services rendered the firm?
53. Give the four ways in which a partnership may be dissolved.
54. When may the court dissolve a partnership?
55. Why should notice of dissolution be sent to all persons with whom the firm has dealings?
56. Give the four duties of a master.
57. Discuss contributory negligence.
58. Name five causes for which a servant may lawfully be discharged.
59. What recourse does the servant have when discharged without reasonable cause?
60. Distinguish between private carrier and common carrier.
61. Compare liability of private and of common carriers.
62. How does a draft with a bill of lading affect the title to a consignment?
63. Discuss stoppage in transitu.
65. What is a sale?
66. What is the object of a bill of sale?
67. Name the three requisites to a valid sale.
68. How is the intent of parties determined in the transfer of title?
69. By what six principles are the courts guided in determining intent?
70. Discuss each one of the above principles.
71. When should the vendee inspect goods bought?
72. What are latent defects?

73. What is "Warranty of Fitness"?
74. What implied warranty is there in the sale of material for food?
75. Discuss warranty in sales by sample.
76. What do you understand by fraud in sales?
77. Discuss fully and distinguish between land options and land contracts.
78. Who should be the parties to a land option? To a land contract?
79. What can you say as to the importance of recording?
80. Does the law favor forfeitures? Explain.
81. Distinguish between warranty deed and quit claim deed.
82. Who should examine abstracts of title?
83. Name five covenants most commonly used in a warranty deed.
84. What consideration is necessary in a deed?
85. Explain "Acknowledgment".
86. When does a deed become operative?
87. What is an estate in entirety?
88. What is a lease?
89. Explain the relation of landlord and tenant concerning repairs.
90. Discuss rent.
91. What is a check?
92. When should a check be presented for payment?
93. How and by whom is a check certified?
94. What is a bank bound to know regarding a check?
95. What if a bank pays out money on a forged check?
96. What is the depositor's duty regarding paid checks?
97. What do you understand by special deposits?
98. Explain "Set Off".
99. What is an overdraft?
100. Name and give duties of the officers of a bank.
101. What are the liabilities of directors who serve without pay?
102. What is said to be the weight of authority regarding the liability of a bank for collection made from a distant party?
103. What is "Commercial Paper"?
104. Name the more common kinds of commercial paper.
105. Name two strictly negotiable instruments.
106. Discuss advantages of negotiability.
107. Name four conditions under which one cannot become the holder in due course.
108. Give reasons for protecting holders in due course.
109. Name some forms of commercial paper that are as important as money in trade.

110. Mention a few ways in which they facilitate commerce.
111. What can you say about the Negotiable Instruments Law?
112. What is a bill of exchange?
113. Define each of the two classes of bills of exchange.
114. What is a promissory note?
115. Name and illustrate the various kinds of indorsements.
116. When the date of maturity falls upon Sunday or a legal holiday, when should the instrument be presented for payment?
117. What is meant by dishonoring a bill?
118. Explain protest.
119. What is meant by notice of dishonor?
120. Give the six requirements that make an instrument fully and perfectly negotiable.
121. By whom must all negotiable instruments be signed?
122. How may persons who cannot write sign?
123. Is a note payable in property negotiable?
124. If the amount of the instrument written in figures differs from the amount written in words, which controls?
125. What words must an instrument contain to be negotiable?
126. Name five conditions regarding certainty of amount, which under the Negotiable Instruments Law, may enter into an instrument without rendering it non-negotiable.
127. If a negotiable instrument contains a promise to do something besides making a payment in money, how is the negotiability affected?
128. Name four clauses that a negotiable instrument may contain without impairing the negotiability.
129. Name five possible omissions and specifications in an instrument, either or all of which will not, necessarily, impair its negotiability.
130. Discuss antedating and post dating.
131. What can you say as to filling up blanks?
132. When is an instrument negotiated?
133. Distinguish between original and subsequent parties to a note.
134. Give five possible conditions, under any one of which the drawer would remain liable whether proper presentment or notice had or had not been given.
135. Discuss liability of drawer, drawee, maker and acceptor, payee, holders who transfer by delivery, general indorsers.
136. When must presentment for acceptance be made?
137. When is presentment for acceptance excused?
138. How must presentment for acceptance be made?
139. How long may the drawee have in which to decide whether or not to accept the bill?
140. Name and define two kinds of acceptance.

141. Give five different ways in which an acceptance may be qualified.

142. Why present for payment?

143. When is presentment for payment excused?

144. Discuss waiver.

145. Give the six formalities that are waived by the words "Protest Waived" when written or printed on the face of a note or bill.

146. When is an instrument protested?

147. What is a protest?

148. What four things must be set forth in a certificate of protest?

149. Mention various omissions which discharge drawers and indorsers.

150. What is a surety?

151. What is a guaranty?

152. What is usury?

153. What is a bonus?

154. What right to reimbursement does an indorser have?

155. Distinguish between indemnity bonds and money bonds.

156. What is a mortgage?

157. Name the parties to a mortgage.

158. Name three general classes of mortgages.

159. Should a mortgage be acknowledged and recorded?

160. What is an insecurity clause?

161. Define and explain foreclosure.

162. Discuss forced sale and the rights of mortgagee, mortgagor, and purchaser.

163. Explain subrogation.

164. When does a deed operate as a mortgage?

165. How is a bill of sale considered if given as security?

166. Discuss assignment of mortgage.

167. What is a pledge?

168. Discuss pledges of corporate stock.

169. Give the process of foreclosure of pledge.

170. What is a lien?

171. Explain vendors' lien.

172. What is a workman's lien?

173. Discuss carriers' lien.

175. How may a lien be acquired by attachment?

176. Explain garnishment.

177. Explain judgment liens.

178. By what states have exemption laws been adopted?

179. Name some things that have been held exempt.

180. What effect has a legal tender upon a lien?

181. In what amount should a tender be made?

182. How does one bind himself by making a tender?

183. Can one who pays a debt for another recover from the debtor?
184. When a debtor owes several debts due to the same person and makes a payment, how may the payment be applied?
185. Name seven logical steps of procedure in the collection of a debt.
186. Discuss statutes of limitation.
187. When is a statute of limitation in suspension?
188. How may an outlawed obligation be renewed?
189. Discuss bankruptcy, those who may become bankrupt, acts of bankruptcy, insolvency, discharge.
190. In bankruptcy, what debts must be paid before the general creditors are paid?
191. Why is bankruptcy resorted to?
192. What is a corporation?
193. Compare corporation and partnership.
194. How are the powers of a corporation derived?
195. How many persons may incorporate?
196. How is a corporation formed?
197. Name seven things that must be specified in the articles of association.
198. How is the name of a corporation restricted?
199. What is capital stock?
200. What are shares?
201. What is treasury stock?
202. What may the face value of a share of stock be?
203. How may stock be paid for?
204. Where must the location of the principal place of business of a corporation be?
205. What states are very liberal in chartering corporations?
206. What is meant by *ultra vires*.
207. Give three ordinary powers of a corporation.
208. When does one become a stockholder in a corporation?
209. How long does the charter of a corporation last?
210. Explain *de jure*.
211. What is meant by *de facto*?
212. What are by-laws?
213. What are some of the provisions usually embodied in the by-laws?
214. Name about twenty of the features commonly covered by a set of by-laws of a manufacturing company.
215. What should always be done before investing?
216. Distinguish between common and preferred stock.
217. Distinguish between cumulative and non-cumulative preferred stock.

- 218. What is meant by "fully participating"?
- 219. How do stockholders usually vote?
- 220. Explain cumulative voting.
- 221. What is voting by proxy?
- 222. Discuss transfer of stock.
- 223. Who are the officers of a corporation?
- 224. Give powers and duties of the officers of a corporation.
- 225. May a director draw a salary?
- 226. What reports must be made by a corporation?
- 227. What is done if the corporation fails to make the annual report?
- 228. Who may cause a corporation to be placed in the hands of a receiver?
- 229. Who is a receiver?
- 230. By whose consent may a corporation usually be dissolved?

TABLE A.

Statute of Frauds.

Contracts for the purchase of personal property exceeding in value the amounts herein specified must be in writing, unless (a) the property is wholly or partly delivered to the purchaser, or (b) earnest money is paid to bind the bargain, or (c) all or a part of the purchase price is paid.

STATES.

Ala.	Statute not in force.
Ari.	\$500
Ark.	\$30
Cal.	\$50
Colo.	\$50
Conn.	\$100
D. C.	\$50.
Fla.	Any value.
Ga.	\$50.
Idaho	\$200.
Ill.	Statute not in force.
Ind.	\$50.
Iowa	Any value.
Kan.	Statute not in force.
Ky.	Statute not in force.
La.	\$500.
Maine	\$30.
Md.	\$50.
Mass.	\$50.
Mich.	~~\$100~~
Minn.	\$50.
Miss.	\$50.
Mo.	\$30.
Mon.	~~\$200~~

Neb.	\$50
Nev.	\$50
N. H.	\$33.
N. J.	\$500.
N. M.	\$50.
N. Y.	\$50.
N. C.	Statute not in force.
N. D.	\$50.
Ohio	\$100.
Okla.	\$50.
Ore.	\$50.
Penn.	Statute not in force.
R. I.	\$500.
S. C.	\$50.
S. D.	\$50.
Tenn.	Statute not in force.
Texas	Statute not in force.
Utah	\$200.
Vt.	\$40.
Va.	Any value.
Wash.	\$50.
W. Va.	Statute not in force.
Wis.	\$50.
Wyo.	\$50.

TABLE B.

Contractual Powers of Married Women.

STATES.	Can a married woman become a sole trader, and is she suable at law for debts contracted as such the same as if single?
---------	--

Ala.	Yes.
Ariz.	Yes.
Ark.	Yes.
Cal.	Yes, if she obtain permit from Superior Court.
Colo.	Yes.
Conn.	Yes.
Del.	Yes.
D. C.	Yes.
Fla.	Yes, if she obtain leave from Circuit Court. Cannot contract with husband.
Ga.	Yes, except as surety and for debt of husband.
Idaho.	Yes, by decree of District Court.
Ill.	Yes, but cannot form co-partnership without husband's consent.
Ind.	Yes, except as surety. Husband must join in mortgage or deed of land.
Iowa.	Yes.
Kan.	Yes.
Ky.	Yes. Cannot become a surety.
La.	Yes, if she carries on separate business from husband.
Maine.	Yes.
Md.	Yes.
Mass.	Yes, but she should file certificate that she is doing business on her separate account.

Mich.	Yes, but cannot be a surety for or partner with her husband.
Minn.	Yes, but she cannot convey land or lease it for more than one year without husband joining.
Miss.	Yes, but husband must join in conveyance of home- stead.
Mo.	Yes.
Mont.	Yes, under certain conditions.
Neb.	Yes.
Nev.	Yes, if declared a sole trader by order of Court.
N. H.	Yes, but cannot be surety for husband.
N. J.	Yes, except as accommodation indorser, guarantor or surety.
New Mex.	Yes.
N. Y.	Yes.
N. C.	Yes, by entering herself as such in Registrar's office where she proposes to do business.
N. D.	Yes.
Ohio.	Yes.
Okla.	Yes.
Ore.	Yes.
Pa.	Yes.
R. I.	Yes.
S. C.	Yes.
S. D.	Yes.
Tenn.	No
Texas.	Yes, but cannot contract as partner or buy on credit Her profits are liable for husband's debt.
Utah.	Yes.
Vt.	Yes, except with husband.
Va.	Yes.
Wash.	Yes.
W. V.	Yes, but she cannot be partner with husband.
Wis.	Yes, but executions on judgments against her must be satisfied out of her separate estate.
Wyo.	Yes.

TABLE C.

Interest and Usury.

RATE OF INTEREST.			
States	Legal Rate Per Cent	Limit Allowed by Contract.	Statutory Penalty for Usury.
Ala.	8	8	Forfeiture of interest. and costs.
Ariz.	6	12	No penalty.
Ark.	6	10	Forfeiture of debt.
Cal.	7	2 per mo.	No penalty.
Colo.	8	2 per mo.	No penalty.
Conn.	6	12	Forfeiture of debt.
Del.	6	6	Forfeiture of sum.
D. C.	6	6	Forfeiture of interest.
Fla.	8	10	Forfeiture of double the excess.
Ga.	7	8	Forfeiture of excess above legal rate.
Idaho	7	12	Forfeiture of 10 per cent of principal.
Illinois	5	7	Forfeiture of interest.
Ind.	6	8	Forfeiture of interest over 6 per cent.
Iowa	6	8	Forfeiture of excess interest.
Kan.	6	10	Forfeiture of double amount of usurious interest.
Ky.	6	6	Forfeiture of excess interest.
La.	5	8	Forfeiture of interest.
Maine	6	No limit	No penalty.
Md.	6	6	Forfeiture of excess interest.
Mass.	6	No limit	No penalty.
Mich.	5	7	Forfeiture of all interest.
Minn.	6	10	Forfeiture of interest.

Interest and Usury.—*Continued.*

States	Legal Rate Per Cent.	Limit Allowed by Contract.	Statutory Penalty for Usury.
Miss.	6	8	Forfeiture of interest.
Mo.	6	8	Forfeiture of interest and security.
Mont.	8	12	Forfeiture of double interest.
Neb.	7	10	Forfeiture of interest.
Nev.	7	12	No penalty.
N. H.	6	6	Forfeiture of three times excess of interest.
N. J.	6	6	Forfeiture of interest and costs.
N. M.	6	12	Forfeiture of excess interest.
N. Y.	6	6	Forfeiture of debt and interest.
N. C.	6	6	Forfeiture of interest.
N. D.	7	12	Forfeiture of all interest.
Ohio	6	8	Forfeiture of excess above 6 per cent.
Okla.	6	10	Forfeiture of interest.
Ore.	8	10	Forfeiture of principal and interest.
Penna.	6	6	Forfeiture of excess interest.
R. I.	6		See statutes of state.
S. C.	7	8	Forfeiture of interest and costs.
S. D.	7	12	Forfeiture of interest; usury a misdemeanor.
Tenn.	6	6	Forfeiture of excess of interest.
Texas	6	10	Forfeiture of interest.
Utah	8	12	Forfeiture of debt.
Vt.	6	6	Forfeiture of excess interest.
Va.	6	6	Forfeiture of interest.
Wash.	6	12	Forfeiture of double the accrued interest if paid.
W. Va.	6	6	Forfeiture of excess interest.
Wis.	6	10	Treble amount of usurious interest paid can be recovered.
Wyo.	8	12	Forfeiture of interest.

TABLE D.

Statutes of Limitations.

Claims are barred in the several states after the expiration of the following statutory periods:—

States	On Open Accts.	On Notes and Bills of Exchange.
Ala.	3 years	6 years; under seal, 10 years.
Ariz.	3 years	4 years.
Ark.	3 years	5 years.
Cal.	4 years	2 years; 4 years when executed within State.
Colo.	6 years	6 years.
Conn.	6 years	Non-negotiable paper, 17 years; others 6 years.
Del.	3 years	6 years.
D. C.	3 years	3 years.
Fla.	3 years	5 years.
Ga.	4 years	6 years; under seal, 20 years.
Idaho	4 years	5 years.
Ill.	5 years	10 years.
Ind.	6 years	10 years.
Iowa.	5 years	10 years.
Kan.	3 years	5 years.
Ky	5 years	5 years.
	Save between merchant and consumer, then 2 years.	
La.	3 years	5 years.
Maine.	6 years	6 years.
Md.	3 years	3 years; 12 years if sealed.

Statutes of Limitations—Continued.

States	On Open Accts.	On Notes and Bills of Exchange
Mass.	6 years	6 years.
Mich.	6 years	6 years; under seal 10 years.
Minn.	6 years	6 years.
Miss.	3 years	6 years.
Mo.	5 years	10 years.
Mont.	5 years	8 years.
Neb.	4 years	5 years.
Nev.	4 years	6 years.
N. H.	6 years	6 years; when secured by mortgage, 20 years.
N. J.	6 years	6 years.
N. M.	4 years	6 years.
N. Y.	6 years	6 years.
N. C.	3 years	Sealed instruments, 10 years; others 3 years.
N. D.	6 years	6 years.
Ohio.	6 years	15 years.
Okla.	3 years	5 years.
Ore.	6 years	6 years.
Penna.	6 years	6 years.
R. I.	6 years	6 years.
S. C.	6 years	6 years.
		writings, 6 years.
S. D.	6 years	6 years.
Tenn.	6 years	6 years.
Texas.	2 years	4 years.
Utah.	4 years	6 years.
Vt.	6 years	6 years.
Va.	3 years	5 years.
Wash.	3 years	6 years.
W. Va.	5 years	10 years.
Wis.	6 years	6 years.
Wyo.	8 years	10 years.

INDEX.

THE NUMBERS GIVEN REFER TO SECTIONS.

Acceptance	37, 256
Accord and satisfaction	365
Acts and forbearances	74
Acts of bankruptcy	379
Adverse possession	26
Agents	120 to 136
authority of	124
disregard of instructions	136
duty of	126
general agents	122
kinds of	121
liability of	128
power of attorney	124
ratification of unauthorized act	125
signature of	55, 129
special agents	123
termination of authority	130 to 135
Agreement	27, 31, 33, 34, 35
Alteration	116
Alteration, material	313
Annual report of corporations	410
Application of payments	366, 374
Assignment for benefit of creditors	376
Assignment of lease	225
Assignment of mortgage	342
Attachment	350
Bank	226
as collection agent	243
cashier	240
directors of	241, 242
president of	238
vice president of	239
Bankruptcy	377
acts of	379

Bankruptcy	
debts first paid	382
discharge in	381
insolvency	380
who may enter	378
use of	383
Bills of exchange	252
acceptance of	256
dishonor of	258
issue of	254
maturity of	257
notice of dishonor	260
parties to	255
presentation of	256
protest	259
settlement upon	262
want of notice	261
Bill of lading	174, 175, 244
Bill of sale	180, 341
Bonus	316
Breach of contract	110, 111, 112
Bulk sales of merchandise	196a
By-laws	396
Cancellation	102
Cancellation of orders	39
Capital stock and shares	388
Capture by enemy	22
Care in selecting servants	155
Carriers	
act of God	166
discrimination in rates	176
kinds of	163
liabilities of	164 to 172
lien of	349
limitation of liability	169
loss by	167
loss by connecting line	170
loss from natural causes	168
receipts	174
rules	173
stipulation as to value	172
stoppage in transitu	177
Cautions	8
Charter	386
Checks	
certified	231

Checks	
forged	232
not assignment	230
notes as	236
presentation of	228
returned	233
stoppage of payment	229
Clerical errors	90
Collections	243
Collection of debts	367
outlawed claims	369
procedure in	368
Commercial paper	244
Compromise	364
Corporations	384 to 412
annual reports	410
by-laws	396
capital stock	388
charter of	386
compared with partnerships	385
cumulative voting in	400
directors	404
dissolution of	412
duration	393
incorporators	394
kinds of stock	398
location of place of business	390
payment of stock	389
powers and duties of officers	403
powers and purposes	391
preliminary investigation of	397
president	405
proxies	401
receivers	411
recording articles of association	395
salaried officers	409
secretary	407
shares of	388
subscription to stock	392
transfers of stock in	402
treasurer	408
vice president	406
voting powers of stock holders	399
Corporate stock, pledges of	344
Consideration	69. to 76

Consignments	187
Contracts	
acceptance	37
agreement	33, 34, 35
alteration	116
breach of	110, 111, 112
cancellation	39, 102
certainty	77
clerical errors in	90
construction of	89 to 97
consideration for	69 to 76
defined	27
delivery	51
disaffirmance	59, 60
discharge in bankruptcy	118
enforceable	28, 32
false representation	105, 106, 107
forgery of	117
form	31, 41, 43
for sale of land	47
for sale of standing timber	48
for sale of personal property	49
for services	50
for necessities	58, 64, 68
fraud	61, 63
fraud in	104
gambling contracts	85
illegal	78, 79, 80
immoral	88
importance of	27
impossibility of performance	100
improperly expressed	43
incompetent parties	56
in consideration of marriage	46
in restraint of trade	82
in writing	52 to 55
land	201, 202
legally binding	28, 32
lunatics and drunken persons	62
marriage brokerage contracts	86
merger	115
mistake in	108, 109
not to be performed within one year	44
offer to make	36, 40
oral	27, 30

Contracts

performance	99
performed	51
rescission	103
revocation	38
statute of limitation	119
stifling competition	83
substitution	101
termination	98 to 113
to influence public officials	84
to pay debt of another	45
usurious contracts	87
written	30, 95, 96
Cumulative voting	400
Damages	14
Dartmouth College Case	6
Deeds	205
consideration	210
delivery	212
description of land in	206
estates by entireties	214
execution	211
execution in blank	215
quit claim	209
recorded	216
unrecorded	213
warranty	208
Delivery of deed	212
Deposits, general	227
special	234
Description	192
Description of land	206
Directors	404
liabilities of	242
power of	241
Discharge	161
Discharge in bankruptcy	118, 381
Discrimination in rates	176
Dishonor	258, 270
Dissolution of corporations	412
Due care	7, 9, 10
Duress	56, 63, 66
Estates by entireties	214
Eviction of tenant	221, 223
Exemptions	353

False representations	105
Forcible felonies	18
Foreclosure	332
Foreclosure of mortgage	342
Forfeiture under land contracts	204
Forgery	117
Form	
bill of exchange	254
bill of sale	180
by-laws	396
certificate of protest	259
indorsements	265, 291
land contract	201
land option	199
lease	217
notice of non-payment	260
notice to quit	222
of proxy	401
of warranty deed	208
promissory note	263
real estate mortgage	326
title note	188
Fraud	104
Fraud in sales	196
Gambling contracts	85
Garnishment	351
Guarantors	268, 312
Guaranty	323
Good considerations	71
Holder in due course	247 to 250
Indemnity bonds	322
Indorsement	321
conditional	291
forms of	291
in blank	264, 291
in full	265
liability upon	290
qualified	291
restrictive	269, 291
special	291
without recourse	267, 292
with waiver	266
Indorsers	
discharge of	210
liability of	290

Indorsers	
waiver of.....	266, 304, 305
Infants	56; 57
Insolvency.....	380
Inspection of goods	189
Interest, payment in advance.....	317
Interest, Table C, Appendix	
Judgment liens.....	352
Land contracts.....	200
forfeiture.....	204
recording.....	203
Land options.....	198
Landlord, duties of.....	218, 219, 220
Latent defects in goods.....	190
Law	
common law.....	4
confusion of.....	5
constitutionality.....	6
contracts in violation of.....	79 to 88
harmony in.....	5
ignorance of.....	1
natural justice.....	4
negotiable instruments law.....	5; 251, 280, 282
of place.....	97
purpose of.....	2
statute law.....	5
study of.....	3
unconstitutional.....	6
Lease, assignment of.....	225
renewal of	219
Legal tender.....	355
Liens.	346
by attachment.....	350
by garnishment.....	351
by judgment.....	352
carriers'.....	349
vendors'.....	347
workmen's	348
Limitation.....	113
Loans	318
Lunatics.....	56, 62, 65
Marriage brokerage contracts.....	86
Marriage, contracts in consideration of.....	46
Married women.....	56, 67
Powers of, Table B, Appendix	

Master, duty of	151 to 159
Memorandum of contract	53 to 55
Merger	115
Mistake	108, 109
Mortgages	324
assignment of	342
bills of sale operating as	341
chattels	327
deeds operating as	339
deficit and surplus	334
description of property in	331
dual	338
foreclosure	332
foreclosure sale	333
permission to sell	329
real estate	325, 326
redemption	336
rights of purchaser	335
securing note	330
security clause	328
subrogation	337
Mutual promises	73
Name of corporation	387
Necessaries	58, 64, 68
Negligence	10, 11, 13
contributory	13
in executing written instruments	15
in filling blanks	15
of carriers	169, 171
Negotiable instruments	245
acceptance of	297 to 300
acceptance for honor	302
additional provisions in	280
advantages of	246
antedating	281
blanks in	15, 282
certainty	279
classes of	252, 253
discharge of drawers and indorsers	310
dishonor of	293
drawee of	286
drawer of	285
forbearance in	276
forgery of	314
holder of in due course	247

Negotiable instruments

interest upon	317
law	251
material alteration of	313
maturity	277
negotiation of	283
parties to	284
payable in money	275
payee of	288
presentment of	294, 296
presentment for payment	303, 306, 307
protest	308, 309
postdating	281
qualified acceptance of	301
reason for protest	250
signing	274
transferee of in due course	248, 249
transfer of	289
usury in	315, 316
waiver of	304, 305
when writings are	273
words of negotiability	278
Negotiable Instruments Law	5, 251
Notice to quit	222
Offer	36
Opinion	106, 107
Overdrafts	237
Partners	137 to 149
classes of	138
compensation of	147
good faith of	144
misappropriation by	142
sharing profit and loss	146
suits by	145
Partnerships	
creation of	149
dissolution of	148, 149
kinds of	140, 141, 143
Parties incompetent	56
Payment	51, 360
accord and satisfaction	365
application of	366, 374
by compromise	364
notes, checks and orders as	362
to wrong person	361

Payment

voluntary	363
Personal property, contracts for sale of	49
Pledges	343
foreclosure of	345
of corporate stock	344
Police power	22
Powers and purposes of corporations	391
Prescription	25
Promissory notes	253
collection of	271
issue of	263
surety upon	272

Property

adverse possession	26
capture by enemy	23
deprivation of	21
destruction of	22
kinds of	16
lost and found	20
personal	16
possession of	18, 19
prescriptive rights	25
real estate	16
right to defend	18
right to use	17
seizure under process	24
Protest	259
Proximate cause	14
Public officials, contracts to influence	84
Public policy, contracts contrary to	80
Quit claim deed	209
Rescission	103
Reasonable time	94
Receivers	411
Recording deeds	216
Recording land contract	203
Renewal of lease	219
Rent	221
Repairs on leased property	220
Replevin	19
Reservation of title	188
Restraint of trade, contracts in	82
Returned checks	233
Revocation	38

Sale	178 to 196
bill of	180
by sample	195
conditional	185 to 188
description in	192
delivery	186
for cash	183
fraud in	196
inspection of goods	189
latent defects	190
on consignment	187
on credit	184
passing of title	182 to 188
quality of goods	191
requisites of	181
reservation of title	188
warranty of fitness	193, 194
Satisfaction	92
Security	319
Seizure under process	24
Servant	
contributory negligence of	158
discharge of	161, 162
duty of	160
payment of	159
risks assumed by	156, 157
Services, contracts for	50
Signing by agent	55
Statute of frauds, Table A, Appendix	
Statutes of limitations, Table D, Appendix	
Statute of limitation	119, 370 to 375
renewal of barred debt	373, 374, 375
suspension of	371
when operative	370
withdraws remedy	372
Statute law	5
Stifling competition, contracts for	83
Stoppage in transitu	177
Substitution	101
Sureties	272, 311
Suretyship	320
Tender	354
admits debts	359
amount	357
kept open	358

Tender

objection to	356
Title	179
Transfer of stock	202
Trover	19
Usury, Table C, Appendix	
Valuable consideration	76
Vendee	178
Vendor	178
Vendors' liens	347
Warehouse receipts	244
Warranty deed	308
Warranty of fitness	195, 194
of quality	195
Workmen's liens	348
Wrongful discharge	162

51 - wed
Tues - Fri
Thurs - Tues
Mon - Thurs
Wed - Fri



W8-BGV-774

